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Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

In the Matter of Disciplinary Proceedings against

HARRIET BOUSLOG SAWYER,

a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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No. .....

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HARRIET BOUSLOG SAWYER,

a Member of the Territorial Bar of the Territory of Hawaii,

Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Harriet Bouslog Sawyer respectfully petitions that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed a judgment of the Supreme Court of the Territory of Hawaii adjudging petitioner, a lawyer, guilty of gross misconduct and ordering surrender of her license and her suspension from practice for a period of one year.

Opinions Below.

The opinion of the court below is as yet unreported. A copy of the majority, concurring and dissenting opinions[1] is appended to this petition as Appendix A.

The opinion of the Supreme Court of the Territory

[1]After initial submission to the normal three-judge division of the court below, the case was heard *en banc* and the court divided four to three for affirmance.

of Hawaii (herein called the Territorial Court) is reported at 41 Haw. 403. A copy of that opinion is set out in Appendix B to this petition.

Jurisdictional Grounds.

The judgment of the Court of Appeals was made and entered June 9, 1958. Neither rehearing nor extension of time for filing this petition has been requested or ordered.

Jurisdiction of this Court is invoked under 28 U. S. C. 1252(1).

Questions Presented.

1. Whether a lawyer may be disciplined in a manner tantamount to disbarment[2] because of having made public comment concerning a pending case in which he is one of counsel of record

(a) merely because he is counsel of record in the pending case and therefore "under restraints not applicable to the public in general";

(b) without reference to, indeed in rejecting, the clear and present danger rule (see *Bridges v. California*, 314 U. S. 252, 273; *Pennekamp v. Florida*, 328 U. S. 331, 347);

(c) notwithstanding that the comment falls short of utterances which (i) endanger the fair administration of justice or (ii) fail to maintain the respect due the courts as the usual course of decision has defined that term;

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[2] The judgment of the Territorial Court is virtually tantamount to disbarment. For under Rule 15(d) of the Rules of the Territorial Court (App. E, *post*, p. 73) an attorney suspended for more than six months must again, "as though applying for admission to the Bar," satisfy that court both as to good moral character and requisite legal learning.

(d) upon evidence that lacks solid and convincing proof of offending conduct and supports reasonable inferences consistent with innocence.

2. Whether the findings of the Territorial Court, approved by the court below, to the effect that petitioner "engaged and participated in a wilful and oral attack upon the administration of justice in and by the said United States District Court . . . and by direct statement and implication impugned the integrity of the judge presiding therein" rest upon such dogmatic inferences as to be wholly unwarranted and are so arbitrary as to offend due process.

3. Whether in the federal courts it is a disciplinary offense for a lawyer, after verdict, to interview trial jurors concerning matters occurring in their deliberations where the lawyer is investigating remarks of the juror concerning wrongdoing and frameup in connection with the trial and verdict.

4. Whether the judgment of the Territorial Court affirmed by the court below, was beyond the jurisdiction of the former and contrary to sound policy governing relations between territorial courts and federal courts in that it purports to set standards of conduct for an attorney with respect to conduct in a federal court and concerning matters pending therein and inevitably affects the right of that attorney to practice before the federal court.

5. Whether by virtue of the arbitrariness of the findings of the court below and the intrusions upon freedom of expression sanctioned and declared by the court below, there have been fashioned standards of professional conduct that menace the independence of the bar in general and the bar of the federal courts in particular.

Provisions of Constitution, Statutes, Regulations Involved.

The United States Constitution, First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U. S. C. A., Constitution, p. 46.)

United States Constitution, Fifth Amendment:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." (U. S. C. A., Constitution, p. 47.)

28 U. S. C., Section 1293:

"The courts of appeal for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively, in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

28 U. S. C., Section 2108:

"Where the power of any court of appeals to review a case depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence."

Section 9701, Rev. Laws of Haw. (1945), as amended:

"Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts or record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended October 31, 1953. (39 Haw. 707.) Text set forth in Appendix C.

Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as amended April 21, 1954. (unreported) Text set forth in Appendix D.

Rule 15(d), Rules of the Supreme Court of the Territory of Hawaii (effective October 3, 1955). (40 Haw. 764.) Text set forth in Appendix E.

Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as amended and effective March 21, 1955). (unreported) Text set forth in Appendix F.

Statement of the Case.

The Judgment and Its Effect.

The court below affirmed the judgment of the Territorial Court that petitioner "be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever" for a period of one year.[3] [R. 118.][4] As already indicated this suspension has the effect of disbarment.

The Proceedings in the Territorial Court.

This case originated with a complaint of the Bar Association of Hawaii filed July 8, 1954 [R. 3, 4], alleging unprofessional conduct by reason of (a) things said by petitioner in a speech given at Honokaa, Hawaii, on December 14, 1952 and during the trial of a case entitled *United States v. Fujimoto* in the District Court for the District of Hawaii,[5] she being one of counsel therein, and (b) interviews in late June, 1953, of a juror in that case after verdict.[6]

Following a hearing on the complaint before the Legal Ethics Committee of the Territorial Court, and upon the report of that Committee [R. 14-18] the Territorial Court ordered petitioner to show cause why the findings, conclusions and recommendations of the Committee should not be adopted. The matter was argued and submitted to the Territorial Court upon the record made before the Legal Ethics Committee.

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[3]That judgment was stayed, pending appeal, by the court below.

[4]References in the form R. ..... are to the record printed for the use of the court below.

[5]That cause arose upon an indictment charging conspiracy to violate the Smith Act (18 U. S. C. 2385). The judgments of conviction were later reversed by the court below. (Case No. 13915, unreported.)

[6]The complaint as to the juror episode was amplified by a bill of particulars. [R. 5-13.]

The Evidence and the Findings—the Honokaa Speech.

Petitioner made a speech at the time and place and under the circumstances alleged. The *Fujimoto* case was then at trial in Honolulu before the Honorable Jon Wiig, United States District Court Judge for the District of Hawaii. Honokaa is situated on a different island from Honolulu some 182 miles distant.

It was charged and the Territorial Court found that under these circumstances and concerning that trial, petitioner had said that horrible and shocking things were going on; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the Government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Upon these findings that court made the following conclusions:

> ". . . she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, . . . She has thus committed what this court considers gross misconduct." [R. 118.]

There is no transcript or other verbatim account of petitioner's speech. A newspaper reporter named Matsuoka took longhand notes preparatory to writing the newspaper article referred to by the majority below. [R. 152, 153; see App. A, p. 13.] A later version of these notes,

"slightly expanded" and prepared at the request of Matsuoka's editor following the "to-do about it in court" [R. 152, 153, 159, 160] was received in evidence. The dissenting judges below accepted as accurate the version of petitioner's speech contained in these notes. Petitioner accepts them as the best available evidence of what she said.[7]

We summarize these notes:[8] (1) the trial is really of Jack Hall to get at the I.L.W.U.; (2) she wanted to tell about some rather *"shocking and horrible things that go on at the trial"*;[9] (3) MEN IN POWER are trying to put people in jail for what they think or read; (4) this is a conspiracy case and the GOVERNMENT uses conspiracy when it does not have a case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (5) there is a myth about F.B.I. AGENTS—they spend their time investigating people's minds while hundreds of tax fraud cases go unpunished; (6) PAUL CROUCH is a witness because he was in Hawaii in 1924. His testimony of what he did in Russia in 1927 has no bearing; that was when Fujimoto was four years old and Hall was thirteen. He testified for weeks without mentioning a defendant; (7) a man should be responsible only for his own acts, not others; this is smear, part of the GOVERNMENT'S propaganda that started before the

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[7]Petitioner also gave a near-contemporaneous version of her speech when she reported to Judge Wiig on the first court day after the speech had been given. Her statement is set out in Appendix C to the majority opinion below. (App. A, pp. 31-37.)

[8]The notes are set out *in haec verba* as Appendix B to the majority opinion below (App. A, pp. 26-30), and they are summarized in the dissent. (App. A, pp. 45-47.)

[9]In this summary the words which are quoted and italicized pertain to the findings of the lower courts. The words in capital letters indicate the subject of most of the ideas and the objects of petitioner's criticisms.

jury was selected; (8) CROUCH testified to things no one could remember 12 years; (9) "THEY" use this kind of testimony "because THEY will do anything . . . to convict"; (10) the GOVERNMENT deliberately uses witnesses whose testimony is different from previous testimony and "have him say things in order to convict," "witnesses testify that the GOVERNMENT tells them to"; (11) JOHNSON testified about books in a duffel bag and Jack Hall is said to have violated the Smith Act because he saw a duffel bag with books in it. The GOVERMENT reads from the books, "they're not dealing with what Jack Hall said"; (12) the GOVERNMENT has carried on a propaganda barrage so long that "just hearing about communism is enough to jail"; (13) the F.B.I. pressures people to testify and causes them to lose their jobs if they won't cooperate and become informers; (14) *"There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the government can't make a case"*; (15) in the *Palakiko-Majors* case[10] testimony of an admission of having coerced a confession was excluded because the declarant was not available to deny it but in the same situation a federal judge lets CROUCH testify about 27 years ago when a defendant was five years old; (16) *"There's no fair trial in the case. They just make up the rules as they go along"*; (17) in 1949 Judge Medina permitted evidence as to what the defendants did from 1934 on, "but the GOVERNMENT can't make a case if it tells just what they did so THEY widened the rules and tell what other people did years ago . . . including the kitchen sink"; (18) *"Unless we stop the Smith trial in its tracks here there will be a new crime.*

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[10]See *Palakiko v. Harper* (9 Cir.), 209 F. 2d 75; cert. den. 347 U. S. 956. Petitioner was counsel of record there.

people will be charged with knowing what is included in books. ideas"; (19) we are threatened with "dark ages of thought control when people won't be able to speak freely"; (20) "she urged her audience to go out and explain what a vicious thing the smith act is."

The testimony of the witnesses concerning the Honokaa speech is fragmentary in the extreme. They give only snatches from the speech and make no attempt to present its full text or to set the isolated remarks in the context of the whole. No witness attempts to quote petitioner's language. The testimony of each witness is summarized in Appendix G.

The Evidence and the Findings—The Interviews of the Juror Fuller.

Petitioner paid three visits in as many days to the home of one David Fuller, a juror in the *Fujimoto* case, beginning at a time about four days after the verdict in that matter had been returned. The initiative for these interviews came from a sister of the juror [R. 314, 210, 432], who reported that he had said that he wanted to confess that the case was a "frame-up." [R. 314.] Petitioner entered the juror's home with no objection from either the juror or his wife. [R. 316, 210, 472.] His wife confirmed to petitioner the report of the sister. [R. 476, 477.] The juror made similar statements to petitioner at the first visit. [R. 477, 318-321.] At petitioner's suggestion Fuller agreed to talk with Hall, one of the convicted defendants. [R. 322.]

Petitioner returned next day with Hall, when, partly as a volunteered statement and partly in response to questioning, the juror related a number of things that went on in the juryroom during deliberations. Most of the

things set out in petitioner's affidavit to the trial judge [R. 42-45] were stated by the juror in the course of this interview. [R. 487-495.] Both petitioner and Hall questioned the juror from time to time. [R. 418, 419, 495.][11]

Petitioner prepared an affidavit covering these interviews which was submitted to Judge Wiig in support of a motion for a new trial in the *Fujimoto* case. [R. 33-47.]

The Territorial Court held the interviews to be "gross misconduct" but apparently did not base its disciplinary judgment thereon. [R. 117-119.] This interpretation of its action is reinforced by that court's finding that the practice of post verdict interviews of jurors "has not been uncommon, if not in fact common practice." [R. 119.] The majority below, however, read the Territorial Court's opinion as "a statement that the penalty for the two charges is imposed concurrently," although conceding that "the matter is not clear." (App. A, p. 20.) The court below said that, if it were reversing on the first charge (the speech), it would "refer the matter back to the Territorial Court to determine clearly and anew what sanction it intended to apply in the second charge." (App. A, p. 20.) It then proceeded to hold that "the evidence sustains the second charge." (App. A, p. 21.)

The Genesis of the Charges.

The origin of the charges against petitioner reveals a curious development of the rules of the Territorial Court so as to effect a special application to this case. The conduct laid against petitioner was engaged in while she was acting as one of counsel of record in the District

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[11]On the third visit there was apparently no discussion with the juror of matters which went on in the jury room. [R. 217, 218, 419, 420.]

Court and in relation to a case pending there. The investigation ordered by Judge Wiig [R. 31-33] evoked no contempt or disciplinary proceedings in his court. At the end of the trial he complimented all counsel, including petitioner, for their "assistance, conduct and demeanor." [R. 510, 524.]

When the trial was over Judge Wiig, without indicating any position in the matter, asked the local bar association "to look into the conduct of Harriet Bouslog in connection with the Smith Act trial." [R. 539-541.] The bar association took no action while the matter was investigated by the Attorney General of the Territory. [R. 535-536.] As the rules of the Territorial Court then stood, only the aggrieved party or the Attorney General could file complaints of attorneys' misconduct. (See App. C, *post*, p. 67.) When the Attorney General took no action the bar association devised an amendment to the Territorial Court's rules permitting the association to file such complaints. (See App. D, *post*, p. 70.) That rule was adopted in April, 1954, and the complaint was filed July 8, 1954, some 18 months after the Honokaa speech and over a year after the juror interviews.

The report of the Legal Ethics Committee was not made until July 1, 1955. [R. 14.] The Territorial Court's decision was rendered April 6, 1956 [R. 93 ff.]; that of the court below on June 9, 1958.

Petitioner's Professional Record.

Petitioner has been a member of the bar since 1936, in the Territory since 1941. [R. 428.] Her professional career has been exemplary. Commenting that "this is no ordinary case" (App. A, p. 42; see also App. A, pp. 63-66) the dissenters below alluded to petitioner's distinguished record of representing unpopular clients. But

this has been a career which involves even more than representing victims of public prejudice or passion. It has encompassed, in the Islands, the emergence of unionization among the workers in the vast sugar and pineapple plantations and in the longshore industry. The conflict of forces thus precipitated contained not only class but racial tensions. There ensued both strike turbulence in the struggle for improved working and living conditions as well as pressures to alter both law and custom affecting the social, civic and political participation of the great non-white masses in the community life of the Islands.[12] In this milieu petitioner served as lawyer for the workers, and her endeavors involved her in strike and picketing cases and the application thereto of national and local statutes, criminal prosecutions, challenges to the constitutionality of criminal states and jury selection systems, and suits to prevent racial discrimination. It is not an exaggeration to say that petitioner's work in these areas contributed to the resolution of profound and potentially explosive social conflicts through the processes of law and reason rather than by violence and destruction.

Basis of Jurisdiction Below.

The judgment of the Territorial Court was appealed to the court below under 28 U. S. C. 1293 on the grounds that this is a case (a) "involving the Constitution . . . of the United States" and (b) wherein the "value in controversy exceeds $5000.00."[13]

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[12]See *e.g., International Longshoremen's and Warehousemen's Union v. Ackerman*, 82 Fed. Supp. 65, 74-86, 95-112, 113-122 (opinion by Circuit Judge Biggs); reversed on procedural grounds 187 F. 2d 860 (9 Cir.), cert. den. 342 U. S. 859; *United States v. Fujimoto*, 105 Fed. Supp. 727, 729, opinion by Circuit Judge Stephens.

[13]The texts of 28 U. S. C. 1293 and 2108 are set out in Appendix J and petitioner's affidavit as to jurisdictional amount, in Appendix K.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. In Holding That a Lawyer, While Serving as Counsel of Record in a Pending Case, May Not Publicly Comment on That Case but Is Subject to Unspecified "Restraints Not Applicable to the Public in General" (App. A, p. 18) the Court Below Decided an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

This tribunal has held that the First Amendment secures a broad latitude of comment by litigants and newspaper editors on cases pending in the courts. *Bridges v. California*, 314 U. S. 252; *Pennekamp v. Florida*, 328 U. S. 331; *Craig v. Harney*, 331 U. S. 367. No decision of this Court directly deals with the question whether the extensive protection accorded non-lawyers applies to members of the bar, whether or not they are counsel of record. The paramount value served by free public discussion at a time when the issues are current and on the part of those best informed argues both the importance of the question here and the error of the holding below.

The court below took the view that participation in this area of public discussion is forbidden the lawyer of record *while the case is pending*. During that period, it held, "the only proper forum for the lawyer to vindicate his clients" is the courtroom. ". . . the judicial process is entitled to protection from those who get their license from a judicial temple . . ." (App. A, p. 15.) Laymen like Bridges and the Times-Mirror are in a different category for they were not "court officers charged with the duty of keeping the temple clean." (App. A, p. 15; see also App. A, p. 18.)

Such sweeping interdiction rests on premises at war with free speech. The lawyer who comments publicly on the case in which he is engaged may, as here, seek, not to vindicate a client, but to alert the public to what in his informed judgment is a serious problem, perhaps a public danger. If perchance he is right he affords the court no "protection" by silence. He discharges no "duty of keeping the temple clean" by withholding criticism. Neither the tabernacle of justice nor the householder's floor is cleansed by sweeping things under the rug. Silence on the part of counsel of record at the time the trial is going on may well result in no effective discussion of his grievances. The key concern of a free society is prompt and meaningful discussion of all issues affecting all branches of government without exception.

There is nothing in the lawyer's license that renders him a built-in apologist for the *status quo* in the judicial branch. So far as we are aware he owes no duty by silence or utterance to afford "protection" to a judicial process that, through any means, results in unfairness. The term "officer of the court" does not have a literal meaning (*Cammer v. United States,* 350 U. S. 399) and it surely does not conscript counsel of record to the task of by silence creating the appearance of justice to mask injustice.

This is not to say that there may not be limits to the lawyer's freedom of comment on pending cases. One is that indicated in *Bridges, Pennekamp* and *Craig, supra.* As with other citizens, he may not engage in utterances that create an "extremely high" risk of interfering with "fair judicial administration." This Court has wisely not attempted to draw any more specifically the line that

sets apart the impermissible in this area. Nor need it in this case. The utterances charged against petitioner fall far short of the expressions afforded protection in the cited cases.

Another limitation is one growing out of the lawyer's position as such. His intimate relation to the court and the judicial process has been said to require that he not engage in comment that brings the courts into disrespect. But here there operates a strict test designed to protect both freedom of speech and the independence of the profession. To merit discipline the utterances must have an enormity that is not consistent with the ability of the court to maintain public respect. We deal with this concept at greater length later herein (*post,* Point 3). Suffice it here to state that the speech condemned by this test is that which (a) threatens the person or reputation of the judge or (b) charges that the judge or court has knowingly misused its powers in a particular case or (c) asserts that the judicial officer is corrupt. No such utterances are involved here.

These we submit apply to lawyers whether they comment on pending matters in which they are of record or otherwise. The crucial fact is not their connection with the pending case but what, *as lawyers,* they say. We have found no cases prior to this holding that the lawyer's duty to maintain the respect owing the courts imposes any greater limit upon the lawyer of record than any other attorney. The cases predicate the limitations here noted upon the lawyer's relation to the court, not to the case.

The court below ignored these criteria, except for its treatment of the clear and present danger test which is discussed below. It offered no standard of its own other

than "restraints not applicable to the public in general" (App. A, p. 18) and "unseemly and certainly at the wrong time" (App. A, p. 17) which are discussed below. The decision stands for the naked proposition that lawyers appearing in pending cases may not comment publicly on what transpires in the courtroom. This is a far-reaching ban on highly useful speech.

2. The Court Below In Imposing the Limitations on Lawyer's Speech Just Noted Decided Several Subsidiary Federal Questions in a Way in Conflict With the Applicable Decisions of This Court in That It Rejected the Clear and Present Danger Test or Any Standard Referable to Risks to Legitimate Ends of Government and Substituted Vague and Undefined Standards Which Included Subjective Evaluation of the Listener.

The Court of Appeals held (App. A, pp. 15, 16) that the holding of this Court in *Bridges v. California, supra,* had no application here and that it rejected the clear and present danger test. Since *Schenk v. United States,* 249 U. S. 47, the test of governmental power to limit speech has been whether its words and circumstantial context are such as to create a clear and present danger of bringing about a substantive evil within the power of Government to prevent. This test has been specifically applied to utterances concerning courts and matters pending before them with the express admonition that the evil must be "extremely serious" and the "degree of imminence extremely high" before the utterance can be punished. *Bridges v. California,* 314 U. S. at 263.

While the clear and present danger test is not a formulary that substitutes for analysis, it does offer a method of evaluation that employs objective criteria

admissibility of the facts his investigation discloses. If he acts upon facts sufficient to put a reasonable person on inquiry he should not be required to develop admissible evidence on pain of severe discipline. Any more severe test would inhibit the lawyer by fear of subsequent punishment and thus deprive the administration of justice of invaluable assistance.

But the rule of the court below makes any inquiry of jurors under any circumstances misconduct subject to severe sanctions. Interview of jurors in connection with matters which in the words of this Court affect "the plainest principles of justice" are absolutely interdicted equally with those which are inadmissible to affect the verdict. It places a crippling restraint upon a lawyer's performance of tasks essential to the protection of the individual and the court. It menaces the independence of the profession. This restraint operates in the federal courts until removed by this Court.

5. In Holding That the Territorial Court Had Jurisdiction to Adjudge the Conduct of a Federal Practitioner Before and in Relation to a Federal Court and Concerning a Case Pending in the Federal Court, the Court Below Decided an Important Question of Federal Law Pertaining to the Proper Relations Between the Territorial Courts and the Federal Courts Which Has Not Been, but Should Be, Decided by This Court.

The Territorial Court has fixed standards of conduct for members of the federal bar in relation to the federal court and concerning matters pending before the federal court. As to both the speech and the juror interview these standards intimately affect the administration of justice

reasonably referable to legitimate ends of government. In rejecting this test the court below (App. A, pp. 14-17) employed no such criteria. It particularized no evil to be avoided, no objective of public interest to be attained. It failed to examine the relationship, causal, logical or spatial, between the utterances in question and any legitimate concern of the state. The speech here was held to merit the drastic consequences visited upon petitioner because, for reasons not stated, it went beyond the undefined "restraints" said to be "applicable" to counsel of record while not "applicable to the public in general". Beyond such protean standards as these, the court below rested its judgment upon the observation that "the comment was unseemly and certainly at the wrong time" (App. A, p. 17) and the rather Delphic statement that the term "officer of the court" has "vitality and is not a transparent euphemism". (App. A, p. 18.)

If the litmus fashioned in the opinion below were to assay public comment of lawyers about the pending cases in which they appear, none would dare to speak. The opinion below gives no indication as to the nature of these "restraints", unless they be to forbid all public comment on any pending case by a lawyer of record. The standard of "unseemly" would also cut off all such comment. Such a test imports largely subjective values, which vary with the bent of the listener, and is censorial. *Thomas v. Collins,* 323 U. S. 516, 534; *Herndon v. Lowry,* 301 U. S. 242, 262-264. The good taste or seemliness of the speaker is not the measure of his right to speak, even where he is offensive and stirs anger and unrest. *Cantwell v. Connecticut,* 310 U. S. 296, 310; *Terminiello v, Chicago,* 337 U. S. 1, 5.

Moreover, the rejection of the clear and present danger test was couched by the court below in language of such disingenuous exaggeration as to unsettle the gravity of so fundamental a constitutional issue. Patently the courts' power to discipline a lawyer for speech may arise in situations which fall far short of that where "his voice would have to rise to a mighty cacaphony reaching the point of causing the audience (a clear and present danger) to march on the court house or to set up such a howl that the judge would be terrified". (App. A, pp. 15, 16.) With no nicer dissection of the problem than this has the court below fashioned a rule that forbids all public comment on pending cases by attorneys of record. It has given no attention to whether the speech here was objectively capable of interfering with the fair administration of justice (*Bridges, Pennekamp, Craig, supra*) or whether, reasonably weighed, that speech could be said to have constituted the offense of failing to maintain the respect due the courts as the cases have defined such conduct.[14] That petitioner was counsel of record and that her comment was critical of what went on in the Smith Act trial before Judge Wiig (as well as all others) in and of themselves were the basis for the lower court's affirmance of the Territorial Court's judgment. This is a flat interdiction of speech concerning pending cases by counsel of record.

The impact of such First Amendment standards on professional independence is manifest. The lawyer is afforded no test whereby before he speaks he can measure his utterances against permissibility in terms of his professional position or the legitimate concerns of government. The criterion of "unseemly" indicated in the opinion below,

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[14]See *post*, Point 3, notes 21, 22 and 23.

especially when combined with the process of arbitrary inference indulged by both lower courts (see *post*, Point 3), would have the lawyer "at the mercy of the varied understanding of his hearers." *Thomas v. Collins, supra,* at 535. In these circumstances there is only one safe course—not to speak.

But not speak for how long? Until the last conceivable judicial act has been performed in the case? Not, let us say, from 1951 when the *Fujimoto* indictment was found until 1958, when it was dismissed? Or, to speak, but ever so cautiously? Even the most considered criticism of the conduct of a trial that broached upon the nature and effect of rules of law applied therein would be open to some claim that it attacks the trial judge. One recognized function of the lawyer is to serve as a tribune "to warn their fellows when liberty is threatened and to lead them in combating the danger." Editorial, 39 A. B. A. Jour. 692. See also *In re Hearings Concerning Canon 35* (Colo. 1956), 296 P. 2d 465, 470; Jessup, *The Professional Ideals of the Lawyer, A Study of Legal Ethics* (N. Y. 1925), p. 24.[15]

Of no less moment is the effect of these restraints upon the lawyer's court room advocacy. If a lawyer is to be disciplined for his criticism of rules of law and their application, the tactics of the prosecutor and other law enforcement agencies when these criticisms are made in public 180 miles from the seat of trial, he will be hesitant to say them to the judge's face. We have no place for a bar that is not free to tell a judge that he is not giving an accused a free trial or that his rulings advantage an opponent.

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[15]The literature abounds with recognition of the interconnection between this function and the necessities of a free society. See Appendix H, *post,* p. 83.

3. In Affirming the Findings of the Territorial Court That Petitioner's Speech Constituted a Wilful Attack Upon the Administration of Justice in the District Court and Impugned the Integrity of the Trial Judge, the Court Below Decided a Federal Question in a Way in Conflict With the Applicable Decisions of This Court and so Far Sanctioned a Departure From the Accepted and Usual Course of Judicial Proceedings as to Call for the Exercise of This Court's Power of Supervision in That the Finding Is so Dogmatic an Inference as to Be Wholly Unwarranted and so arbitrary as to Be Offensive to Due Process.

We deal here with oral evidence of verbal utterances made at a public meeting nearly two years before the disciplinary proceedings were held. The treachery of such evidence of such matters has long been recognized, as well as the need for the most careful proof which sets out the utterance as a whole with full context and sedulous precision. (See Wigmore, Evidence, Third Ed., Vol. 7, pp. 466, 467, Sec. 2094; *Baumgartner v. United States*, 322 U. S. 665, 675.) The only evidence which approaches this quality is the "notes" of Matsuoka. They are subject to some qualification since they do not profess to be *verbatim* [R. 152], and they are not his original notes but a somewhat "expanded" version made up at the request of his editor after the news accounts of the speech had led to the "to do" in Judge Wiig's court. [R. 159-160, 153.] Although the notes are the best evidence available, these limitations indicate that even this evidence is, to some extent, an interpretation of petitioner's actual speech, and that inferences drawn from it which involve further interpretation may well be unreliable. Subject to

this caveat we, as did the dissenters below (App. A, p. 45), rest our analysis upon the speech as these notes reflect it.

The majority opinion below, in marked contrast to the dissent, evinces no search for reliable evidence of the speech as a whole and no examination of passages in their context. The findings of the majority, as those of the Territorial Court, rest upon isolated selections only. The controlling findings misstate the evidence or by truncation give it a different meaning. Thus (1) the finding that of the *Fujimoto* trial petitioner had said "that horrible and shocking things were going on at the current Smith Act trial in Honolulu";[16] the "notes" show (App. A, p. 26) that this was an introductory remark by way of preface to her speech. It must therefore take on meaning only from all that followed it; (2) the findings that petitioner said of the *Fujimoto* trial "that the trial was not a fair one": according to the notes she at one point said "there is no such thing as a fair trial in a Smith Act case" and this in a context of criticism of F.B.I. tactics in coercing witnesses and a discussion of the differences in admissibility of hearsay in a conspiracy case and in a non-conspiracy case. (App. A, pp. 29-30.) Elsewhere the notes say "there's no fair trial in the case. They just make up the rules as they go along" (App. A, p. 30), and this in a context of the different rules of admissibility of hearsay in conspiracy cases and the government's pressure to expand the rules so as to introduce testimony of conduct by non-defendants remote in time; (3) the finding that petitioner said of the *Fujimoto* trial, "that 'they' just made up

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[16]The findings of the Court of Appeals are at App. A, p. 14. Those of the Territorial Court at R. 117.

the rules as 'they' went along":[17] according to the notes, she said "they just make up the rules as they go along" and this in a context wherein petitioner accused the Government attorneys of seeking to go far beyond the limitations laid down by Judge Medina in the trial of the *Dennis* case; (4) the finding that of the *Fujimoto* trial petitioner said "that unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books": this is virtually a direct quote from the notes. (App. A, p. 30.) As they show, the remark was in a context of observations about another Smith Act trial and the dangers of thought control.

In our statement of the case, *ante*, we have summarized the "notes" and have italicized and quoted the portions bearing upon the findings so as readily to give their context. The words in capital letters indicate the object of petitioner's criticism. Obviously the main theme of her talk was the abuse by the prosecutors of the conspiracy theory in which she had persuasive and learned company.[18] Next in importance was her attack upon the unreliability of Crouch and other Government witnesses.[19]

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[17]The court below did *not* find, as had the Territorial Court, that petitioner said "all the rules of evidence were being scrapped so the Government could make its case." We therefore assume that this finding is no longer in the case.

[18]See Chief Justice Taft and the Senior Circuit Judges, Annual Report of the Attorney General, 1925, pp. 5-6; Justice Jackson concurring in *Krulewitch v. United States*, 336 U. S. 440, 453; Judge Learned Hand in *United States v. Falcone* (2 Cir.), 109 F. 2d 579, 581. See also Lasky, *The Long Bow of Lucretius, Book IV, Line 817*, 43 Cal. L. Rev. 596.

[19]Claims that this witness had a long history of perjured testimony in Smith Act and related prosecutions went unchallenged by the Government, in *Communist Party v. Subversive Activities Control Board*, 351 U. S. 115, 121, 124. For another instance of the use of an obviously unreliable witness in a Smith Act case see *Mesarosh v. United States*, 352 U. S. 1.

That petitioner said that horrible and shocking things were going on at the trial is in itself no evidence that she charged misconduct to the judge or impugned his integrity. That she said "the trial was not a fair one" in and of itself is not an attack upon the court or judge conducting the trial. The unfairness of a trial may result from many things beyond the judge's control, such as the climate of opinion in the vicinage and the use of perjurious witnesses by the prosecutor. The context of these remarks shows that the unfairness petitioner doubtless spoke of was that resulting from F.B.I. coercion of witnesses and the operation of the hearsay rule in conspiracy cases. Concerning the remark about making up the rules as "they" went along, the court below had to read the word "they" as including the prosecutors and Judge Wiig in order to support the judgment of the Territorial Court. (App. A, p. 15.) No such reading of that pronoun is justified by the context of the Matsuoka notes. For they show that petitioner was talking about the conduct of lawyers, Government lawyers. Of the witnesses who remembered a remark substantially similar to this, four [Ferreira, R. 163; John D. Morse, R. 165; Andrade, R. 181 and Phyllis Morse, R. 185] said petitioner spoke of the "Government", and two, Matsuoka [R. 151] and Oliyal [R. 171] used the pronoun "they". To construe "they" as referring to or including Judge Wiig is a plain distortion of the evidence.

Whatever could have been meant by the remark about stopping the trial in its tracks, this could obviously have no reference to Judge Wiig. A fair reading of the statement would attribute to petitioner some such meaning as getting an acquittal by directed verdict or otherwise, or reversing the case on appeal or in some other way resist-

ing and defeating the Government's efforts to prosecute people under a law which petitioner regarded as unfair because it employed the dragnet of conspiracy and was predicated upon books and thoughts.

Arbitrary fact finding based upon no evidence or drawing inferences that the law or good sense and experience forbid, offends due process. There must be evidence that "rationally justifies" the findings. *Schware v. Board of Bar Examiners*, 353 U. S. 232, 246; *Konigsberg v. State Bar*, 353 U. S. 252, 273; *Wieman v. Updegraf*, 344 U. S. 183, 191; *Slochower v. Board of Education*, 350 U. S. 551. See also *Morisette v. United States*, 342 U. S. 246; *Maggio v. Zeitz*, 333 U. S. 56; *Mortensen v. United States*, 322 U. S. 369.

The court below failed to discharge the responsibility cast upon it by the applicable principles of appellate review. Because of the free speech problems here the findings necessary to support the judgment of the Territorial Court had to rest upon a solidity of evidence that took into account the entire speech, the context of the assertedly offensive language and the fair meaning which reasonable minds having petitioner's familiarity with legal procedures would give to the words used, and it was for the court below to make its own evaluation of the evidence. (*Bridges, Pennekamp, Craig, supra.*) The claim of deprivation of due process required the same ransacking of the record. *Schware, Konigsberg, supra, Norris v. Alabama*, 294 U. S. 587. As a lawyer's discipline case the standard of proof was "clear and convincing", free from doubt,[20] and this standard necessitates similar

[20]This is the rule of the Territorial Court (*In re Trask*, 30 Haw. 736, 740), and it is the universal view. Drinker, *Legal Ethics*, 1953, Columbia Univ. Press, p. 46.

reappraisal of the evidence on appeal. Compare *Schneiderman v. United States*, 320 U. S. 118, 122; *Knauer v. United States*, 328 U. S. 654, 658; *United States v. Bridges* (D. C. Cal.), 133 Fed. Supp. 638, 641.

The standards of proof imposed by these considerations can not be satisfied by equivocal evidence. Absent the gloss placed upon "they" by the court below each of the remarks found can reasonably be read as not pertaining to the judge. Where an utterance can be reasonably read as having an innocent meaning the imperatives of the First Amendment deprive it of probative force for guilt. *Schneiderman v. United States*, 320 U. S. 118, 157-159; *Baumgartner v. United States*, 322 U. S. 665, 674, 675; *Hartzel v. United States*, 322 U. S. 680, 687-690; see also *Fiske v. Kansas*, 274 U. S. 380.

The arbitrariness of the fact finding also works a grave infringement of professional freedom. The "gross misconduct" found here is that which the American decisions usually define as failing to maintain the respect due the courts. Because of the need that the "independence of the bar" be "scrupulously guarded" (*Ex parte Secombe*, 19 How. 9, 13) the offense is narrowly drawn. Discipline is imposed only when the lawyer's utterance is marked with an enormity inconsistent with the court's ability to maintain public respect. *Ex parte Wall*, 107 U. S. 265, 288; *Bradley v. Fisher*, 13 Wall. 335, 354. It embraces only those utterances which threatened the person or reputation of the judge[21] or charge that he has knowingly misused his powers in a particular case[22] or claim that the judge

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[21] See, *e.g.*, *Bradley v. Fisher*, 13 Wall. 335. (See App. I for further cases.)

[22] See, *e.g.*, *In re Hilton*, 48 Utah 172, 158 Pac. 691. (See App. I for further cases.)

is corrupt or politically motivated.[23] Petitioner's statements do not meet these criteria. Affront to the courts has been glossed upon her speech by implication and tendency and baseless inference. The heretofore narrowly drawn limitation upon lawyer's utterance has been converted into a weapon of censorship upon the lawyer's advocacy in and out of court.

4. The Court Below Sustained the Findings of the Territorial Court That Petitioner's Interviews of the Juror Fuller Constituted Gross Misconduct Meriting Severe Discipline. In This the Court Below Decided an Important Federal Question Which Has Not Been, but Should Be, Settled by This Court.

Petitioner interviewed, *post* verdict, a juror who had served in the *Fujimoto* case. This she did at the request of his sister and with the consent of his wife after having been told that the juror appeared to be ill and irrational and had made many statements to the effect that he had acted wrongly and that the case was "a frame-up". She inquired of him what had gone on in the jury room in an obvious effort to ascertain either (a) possible infirmity in the verdict by reason of this juror's imbalance during the trial or (b) the factual basis for the assertion of wrong-doing and frame-up. The language of the Territorial Court and its reliance upon *Rakes v. United States* (C. A. 4), 169 F. 2d 739 [R. 119-120] make it plain that the mere interview and interrogation of the juror constitute the gravamen of the offense found.

This is a question for this Court to settle because petitioner's conduct occurred as counsel of record in a case

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[23] See, *e.g.*, *Cobb v. United States* (9 Cir.), 172 Fed. 641. (See App. I for further cases.)

in a federal court with respect to a juror who had served in that same court. The issue is whether a lawyer, a member of the bar of a District Court, while serving in a case pending in that court, commits gross misconduct by interviewing an excused trial juror in that case concerning matters related to the juror's asseverations of wrong-doing and frame-up. This problem relates both to the scope of a lawyer's freedom in the federal jurisdiction to investigate facts bearing upon his client's rights as well as the protection afforded those convicted of serious crime where a cloud is cast upon the verdict. This is no local matter for the Territorial Court or the Territorial Bar. The conduct here occurred in a federal case in a federal court. The court below has held it was misconduct in the federal jurisdiction. In an earlier decision the court below reached a similar result (*Northern Pacific Railway v. Mely* (C. A. 9), 219 F. 2d 199) as did the Fourth Circuit in *Rakes, supra.*

The question calls for a nice balancing of weighty interests. In *Mely* and *Rakes* it was thought that the need for insulating trial jurors from "potential" outside influence arising from an awareness that they might be interrogated concerning the occurrences in the jury room, required the prohibition against interrogation by lawyers. On the other hand there is the public concern in obtaining honest, untainted verdicts by rational jurors. In this connection it has long been recognized that to foreclose all evidence, taken from the jurors' mouths, of influences upon the deliberations might well violate the "plainest principles of justice". *United States v. Reid*, 53 U. S. 361, 366. In that case and in *Mattox v. United States*, 146 U. S. 140, 148-150, this Court held that evidence of "overt acts" (as contrasted with "the personal conscious-

ness" of the jurors, their thought processes) would be admissible to show improper influence upon the verdict. These cases recognize that the existence of "overt acts" is subject to proof and rebuttal by ordinary means of trial whereas matters pertaining to the juror's mental state are incapable of such proof except by the juror's word alone. It would seem that only in the latter case has the rule against permitting the juror's testimony to impeach his own verdict had its genesis and application. *Hyde v. United States*, 225 U. S. 347; *McDonald v. Pless*, 238 U. S. 264. Judge Learned Hand has cogently argued that the rubric against permitting the jurors to impeach their verdict forecloses valuable evidence and that the correct rule should be as here stated from the early cases. *Jorgensen v. York Ice Machinery Corp.* (C. A. 2), 160 F. 2d 432. See also Wigmore, *Evidence*, 3d Ed., Sec. 2353; Compare *Clark v. United States*, 289 U. S. 1, 12-18.

Surely facts relevant to a juror's wrong-doing and "frame-up" in a federal prosecution or his mental imbalance while serving, might well have been admissible to overturn the *Fujimoto* verdict. That being so, petitioner was right in trying to find out what facts there were by interviewing the juror who spoke of these things. She could have done no less to discharge her responsibility to both the District Court and her clients who then faced long prison terms and heavy fines. Here, surely, the public interest in the purity of justice outweighs any other. It would indeed be a hollow rule ringed with irony that would make evidence of this kind admissible but hold the lawyer's investigation of suggestions of it to be misconduct. Nor is it practicable narrowly to circumscribe the lawyer's conduct by rules pertaining to the

in the federal courts. The conduct here does not involve an offense all legal standards condemn. The quality of the conduct as censurable or not stems directly from its relationship to the pending federal matter and its impact upon it. The adjudication of the claimed offensiveness of the conduct was an inseparable part of the federal court's responsibility to manage its own affairs. Judge Wiig, in turning the matter over to the Bar Association, set in motion a train of events that led to a usurpation of his court's power in matters gravely affecting its administration of justice.

The Territorial Court has established, not rules for lawyers in cases before its courts, but standards of conduct for federal attorneys in cases before federal courts. The "deference" normally shown by federal authority for the integrity of a local jurisdiction is, we submit, a two-way street. Compare *Waialua Agricultural Co. v. Christian,* 305 U. S. 91, 108-109.

The procedure followed in *In re Isserman,* 9 N. J. 269, 87 A. 2d 903, indicates the proper relations between the state and federal systems.[24] New Jersey did not undertake to decide that Isserman committed an offense against the federal court. It having been finally decided by the federal court that Isserman had committed the federal offense, New Jersey determined his fitness on that account to remain a member of its bar.

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[24]Isserman had been held in contempt for courtroom conduct during the trial of the *Dennis* case. (341 U. S. 494.) He was adjudged guilty by the federal court in accordance with its own standards and all questions relating thereto were finally resolved by this Court *before* the State court acted. *Sacher v. United States,* 343 U. S. 1.

The genesis of this essentially federal case from the complaint of a local bar association before a local court opened the door to the potential influence of local currents. Petitioner's professional role as counsel for the unpopular union as well as for Smith Act defendants identified her on one side of a social structure so sharply divided as to be called "tense" by one Circuit Judge (*I.L.W.U. v. Ackerman, supra*, p. 77) and by another as one of "clashing economic interests". (*United States v. Fujimoto, supra*, p. 729). As petitioner's affidavit supporting her suggestion of disqualification of Mr. Justice Rice of the Territorial Court [R. 52-65][25] indicates, she and he not only stem from opposite poles in a profoundly defined social antagonism but have opposed each other in bitter litigation arising out of labor controversies.

This Court has recognized that local forces are less sensitive to considerations of national stature and less vigilant in vindicating them. Compare *Board of Education v. Barnette*, 319 U. S. 624, 637-638. It is not claimed and it need not be decided that the judgment of the Territorial Court is tainted by these influences. In areas of exclusive federal concern it has been established policy to eliminate even the appearance of local influences possibly reflecting personal bitterness or group ambitions. Compare *Pennsylvania v. Nelson*, 350 U. S. 497, 507.

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[25]The Territorial Court rejected the suggestion of disqualification. [R. 71-90.] Justice Stainbach withdrew to avoid the appearance of unfairness. [R. 88-90.] Chief Justice Towse was of the opinion that Justice Rice should have done likewise. [R. 92-93.]

Conclusion.

Upon all of the foregoing petitioner prays that this Court issue its Writ of Certiorari to the court below and fully review the questions presented here upon the entire record.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Opinions of the United States Court of Appeals for Ninth Circuit.

In the Matter of Disciplinary Proceeding against Harriet Bouslog Sawyer, a member of the Territorial Bar of the Territory of Hawaii.

them jointly with violations of the Smith Act. On Labor Day five days later on the Island of Kauai she was pleading the cause of the defendants before a Labor Day audience, castigating Smith Act cases in general and this case in particular. That speech resulted in no charges against her and the date she commenced representation of defendants in the case is not clear.

The Honolulu Smith Act case went to trial on November 5, 1952. Eventually the trial was concluded and a jury verdict was returned on June 19, 1953, finding the defendants guilty.[2] It is definite that throughout the extended trial she was representing one or more defendants. Sometimes she missed sessions; if so, she was busy on legal research incident to the case.

On Sunday, December 14, 1952, during the period of the trial, she went to the town of Honokaa on the Island of Hawaii[3] and with the defendant Hall addressed a public meeting primarily attended by members of the International Longshoremen's and Warehousemen's Union. Some segment or segments of that union were financing in whole or in part the defense of the seven. The exact purpose of the meeting does not seem to be clear. Hall and Mrs. Sawyer were apparently the main speakers, although there were others. Based on their own subsequent testimony, it would be fair to characterize the gathering as some kind of an old fashioned "indignation meeting." The speeches of the two resulted in publicity throughout the Islands. The newspaper stories caused the trial judge, Honorable Jon Wiig, to suspend temporarily the trial and question Mrs. Sawyer in open court about her speech at Honokaa. When the colloquy was done, Judge Wiig announced he was not satisfied with her explanation and he instructed the U. S. Attorney for the District of Hawaii to make an investigation.[4] (Mrs. Sawyer's explanation and colloquy with the court is

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[2]The convictions were reversed by this court on January 16, 1958, upon the authority of Yates v. United States, 354 U.S. 298. See Fujimoto, et al. v. United States, No. 13,915, ... F.2d .....

[3]Honolulu is located on the Island of Oahu. The Island of Hawaii is popularly known throughout the Territory of Hawaii as the "Big Island."

[4]A. William Barlow was the United States Attorney for the District of Hawaii during the Smith Act trial at Honolulu and an active par-

set forth as Appendix C.) No proceedings in the district court were ever brought.

Within a day or so after the verdict, a juror, David P. Fuller, Jr., suffered a nervous breakdown and generally became most incompetent. The case was "on his mind;" how much is disputed as is his rationality at the times of various conversations. Visits from Mrs. Sawyer and from Mrs. Sawyer and Hall to Fuller followed. A sister-in-law, Mrs. Ellen Fuller Cabreros, was present as well as Mrs. Fuller and one or more of the Fuller children. As a consequence of these visits and in support of the motion for new trial Mrs. Fuller, Mrs. Cabreros and Hall all made affidavits as to statements made to them by Fuller,[5] the effect of which, if admissible, would be to prove by Fuller's statements to Mrs. Sawyer and Hall what went on in the jury room in the secret deliberations. The purpose was to impeach the verdict. Parenthetically, such affidavits ought to have been stricken from the file of the Smith Act case. (They were merely not considered.) It is hard to believe that counsel did not know of their inadmissibility.

After the close of the trial Judge Wiig orally requested the Hawaii Bar Association, through its president, to look into Mrs. Sawyer's professional conduct during the trial.

This resulted in the association filing on July 8, 1954,[6] with the Supreme Court of Hawaii one complaint with two charges of misconduct in it against Mrs. Sawyer. One charge dealt with the Honokaa speech; the other with the manner of presentation and preparation (the surrounding conduct) of the affidavits. The second charge did not assert falsity, per se, of the affidavits.

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ticipant in the trials. He left the office on September 2, 1954. He appears to have been active in the preparation of the case. He presented it to the legal ethics committee at its hearings which began November 24, 1954. Then, on July 8, 1955, he and the attorney general were appointed to present the case to the court. Barlow's representation in behalf of the complaint, and now the judgment, has continued on appeal.

[5]Mrs. Fuller refused to sign an affidavit prepared for her by Mrs. Sawyer.

[6]Prior to April 21, 1954, under its Rule 19, charges against an attorney were authorized to be filed by the attorney general of Hawaii or

The text of the complaint was as follows:

"COMPLAINT UNDER RULE 19

"To the Honorable, the Justices of the Supreme Court of the territory of Hawaii:

"Comes now the Bar Association of Hawaii, an unincorporated association, and on information and belief complains to this Honorable Court under Rule 19 of the Rules hereof as follows:

I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney-at-law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants," being Criminal Number 10495 in said Court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

"any person aggrieved." By an amendment made on April 21, 1954, charges were authorized to be filed by the attorney general, the Bar Association of Hawaii, or any person aggrieved.

III.

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court.

"Wherefore, the Bar Association of Hawaii prays this Court to refer this complaint to the Committee on Legal Ethics and Unauthorized Practice of this Court for investigation in conformity with Rule 19 of the Rules of this Court.

"Dated: Honolulu, Hawaii, July 8, 1954.

Respectfully submitted,

BAR ASSOCIATION OF HAWAII

By /s/ MASAJI MARUMOTO,

Its President.

"[Endorsed]: Filed July 8, 1954.

"[Title of Supreme Court and Cause.]"

The Supreme Court of the Territory of Hawaii referred the complaint to its Legal Ethics Committee for investigation. Before holding a hearing the committee required the Bar Association of Hawaii to furnish a bill of particulars on the second charge. On September 29, 1954, the bill was filed as follows:

"BILL OF PARTICULARS

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants, Criminal No. 10,495.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In the Matter of Disciplinary Proceedings against HARRIET BOUSLOG SAWYER, a member of the Territorial Bar of the Territory of Hawaii, *Respondent.*[1]	No. 15,109 June 9, 1958

Appeal from the Supreme Court of Territory of Hawaii

Before: STEPHENS, Chief Judge, and HEALY, POPE, FEE, CHAMBERS, BARNES and HAMLEY, Circuit Judges

CHAMBERS, Circuit Judge:

Harriet Bouslog Sawyer became a member of the Territorial Bar of Hawaii in 1941. Since then, except for four World War II years when she was in Washington, D. C., she has been engaged in the active practice of law at Honolulu. A large part of her work has been in the courtroom. Prior to 1941 she had been admitted to practice in Indiana and Massachusetts.

On August 29, 1951, a federal indictment was returned in Honolulu against Charles Kazuyuki Fujimoto and Jack Wayne Hall and five other residents of the Hawaiian Islands charging

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[1]The proceedings in the Supreme Court of the Territory of Hawaii were entitled "In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an attorney at law." In this court, the transcript was printed to indicate Harriet Bouslog Sawyer as appellant and the Bar Association of Hawaii as appellees. The pattern being thus revised, counsel followed it on their respective briefs. This court deems the original entitlement more appropriate and by this opinion restores it with only slight modification.

"'Affidavit of Harriet Bouslog

Territory of Hawaii,
City and County of Honolulu—ss.

I, Harriet Bouslog, being first duly sworn, on oath depose and say:

On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto, et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

Mrs. Fuller said that on Saturday morning, the day immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frame-up; that Jack Hall is a good man; that those people are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendant's side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when

the other jurors said, 'Guilty, guilty,' that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the Judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frame-up, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did. During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that

he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonore and Harry, worked for Isle-Ways. Mrs. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendants' exhibits or case. He said it was a frame-up and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looked at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the first hour

after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

He said that the jury wanted Kawano's testimony. He said that jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

He said that the juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

He said they didn't take any secret ballot, but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism.

He said that they didn't consider the character evidence for the defendants.

He said the second thing the jury decided was that all defendants were members of the Communist Party. The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed.

Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

Further affiant saith not.

/s/ HARRIET BOUSLOG.

Subscribed and sworn to before me this 1st day of July, 1953.

[Seal] /s/ J. D. MARQUES,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires July 15/53.' "

"The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the Committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration of and in corroboration of the charge indicating a failure by the Licensee Harriet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes v. United States, 169 F.2d at pages 745 and 746 and other related cases."

The committee's hearing commenced on November 24, 1954, and after several adjourned sessions was concluded on December 8, 1954. The committee's report was signed on June 9, 1955, and filed on July 1, 1955. The findings sustained the charges. (This report is hereinafter set forth as Appendix A.) The Supreme Court forthwith issued an order to show cause to Mrs. Sawyer.

After a return on the order to show cause, the Supreme Court determined that the hearing before it should be one de novo. However, it was stipulated that the court should make its determination on the record before the committee. No new evidence was received and that court saw no witnesses as such. The court on April 6, 1956, sustained the charges and entered judgment the same day. The judgment suspended Mrs. Sawyer from practice for the period of one year. The judgment has not yet become effective.[7] The Supreme Court's opinion is reported at 41 Hawaii 270. Express reference is made to that decision. Therein many of the procedural events are listed which are not herein listed.[8]

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[7]A division of this Court, Circuit Judge Lemmon dissenting, on May 23, 1956, granted a stay pending the outcome of the appeal herein.

[8]That court's opinion, which is supported by the record, shows that at every step of the proceedings Mrs. Sawyer was accorded procedural due process. To inquire into procedural due process may well be the limit of the scope of any review that this court of appeals is entitled to

Now, what did Mrs. Sawyer do and say at Honokaa and what did she do when she took and presented her affidavit to the U. S. District Court for the District of Hawaii? The Supreme Court hearing the case on the written record had the same record for investigation as we do; no more. No intendments can be given it on the ground it heard and saw the witnesses in person. But still the record tells a story and a clear story that overwhelmingly preponderates to sustain the charges.

On the Honokaa meeting we quote the newspaper article written by the reporter Yoshio Matsuoka in the next edition of the Hilo Tribune-Herald, a newspaper published at Hilo on the Island of Hawaii. We do not suggest that the respondent is to be disciplined because of or for a newspaper article. However, she might have expected her remarks were such as would be publicized. The reason we quote the story from the newspaper is that the findings of both the committee and the Supreme Court implicitly sustain the accuracy of the published item. So far as applicable to Hall and Mrs. Sawyer, it reads as follows:

> "Smith Act trials are aimed at destroying unions and 'must be stopped,' Jack W. Hall and Harriet Bouslog Sawyer asserted here yesterday.
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> "Mr. Hall, ILWU regional director now on trial on Smith Act charges and Mrs. Sawyer, an ILWU attorney, addressed an estimated 230 persons in the People's theater.
>
> "Sponsored by the ILWU unity defense committee, it was one of a planned series of a such meetings to tell communities the 'true facts' of the case since sponsors alleged newspapers cannot be depended upon to tell the facts.
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> "Mr. Hall, speaking for 15 minutes, claimed it was the opinion of the working press in the trial that if the trial were stopped now, the defendants would be acquitted.
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> "He declared the prosecution has presented no evidence against the defendants in six weeks of trial and quoted un-

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make on this type of an appeal. Indeed, one finds in appellant's specifications of error a canting of them in the language of procedural due process, as if counsel were well aware of this possibility.

named 'reporters' as saying 'if this is all the government has, what kind of case is this?'

"No jury in the islands would convict on such evidence, he said, and added he was 'certain' there are 'some courageous people' in the jury.

"He characterized some of the 'things that go on' at the trial as 'unbelievable' and 'frightening.' He said such trials 'can' be stopped and have to be stopped' to halt further 'scare prosecution directed against our union and its members.'

"Mrs. Sawyer, speaking for a half hour, spoke of 'some rather shocking and horrible things that go on at the trial.'

"There's 'no such thing as a fair trial in a Smith act case,' she charged. 'All rules of evidence . . . have to be scrapped or the government can't make a case.'

"They 'just make up the rules as they go along,' she told her listeners.

"Unless we stop the Smith act trial in its tracks here' there will be a 'new crime,' that of knowing what's in books and will lead to 'dark ages of thought control,' asserted the chic and attractive woman lawyer.

"She referred to reading by the prosecution of books 'supposed to have been in a duffel bag' owned by a witness, Henry Johnson. She urged her listeners to tell others 'what a vicious thing the Smith Act is.' Persons are 'tried for books written years ago' by others, she said.

"Mr. Hall said Mr. Johnson was a witness 'just so the government can read a bunch of books.'"

As witnesses, the bar association presented the newspaper reporter and seven other people who were in the audience. Matsuoka had not his original notes of the meeting but did have an expanded version he had made within a few days after the incident from his original notes at the request of the newspaper's editor. These notes were admissible as recorded past recollection. (The notes are set forth as Appendix B.) The association's witnesses from the general audience seem to have been timid and

of course there had been a period of 23 months between the incident and their testimony. These people did not impeach Matsuoka, but substantially corroborated him. The meeting was largely made up of persons in the I.L.W.U. with which organization Mrs. Sawyer was closely associated. We find great significance in the fact that she produced not a single member of the audience to confirm her version. Of the eight other speakers, she brought only the defendant Jack Wayne Hall to testify in her behalf. We think it is not to oversimplify if we say the substance of the testimony of Hall and Mrs. Sawyer as to the event of Honokaa was that her speech was just generalities, a shotgun attack on the Smith Act in general. Generally, the two were very evasive. Hall's explanation was most suave but is unconvincing even on paper. If their versions were accepted, their speeches were strictly professorial or something like that of a Sunday School teacher explaining to her class what they would see just before she took the class into a courtroom.

It seems clear enough that she said at Honokaa:

1. That horrible and shocking things were going on at the current Smith Act trial in Honolulu.

2. That the trial was not a fair one.

3. That "they" just made up the rules as "they" went along.

4. That unless the Smith Act trial at Honolulu was stopped in its tracks there would be a new crime—people will be charged with knowing what is included in books.

With great deftness Mrs. Sawyer's counsel interweave the defense versions of the testimony into the bar association's evidence pointing the other way. They argue that her talk was just general, couldn't have been anything else, and specifically did not refer to the trial before Judge Wiig or to Judge Wiig.[9] Without quoting the record extensively, we say the short way (but not the only way) to negative this contention is to quote a statement

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[9]Counsel for respondent in their reply brief insist they don't dispute that Mrs. Sawyer spoke at Honokaa concerning the Honolulu trial. But a fair characterization of the opening brief is that it says, "Mrs. Sawyer didn't really say much about the Honolulu trial, and that was of no consequence."

(during the course of the hearings) by Mr. J. Garner Anthony, able counsel who represented her before the committee:

> "Mr. Anthony. I will say to the Committee right now—I have read these speeches and I would agree with the conclusion implicit in Mr. Dodge's question, namely that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here."

In context, when Mr. Anthony says, "This was a talk," he was referring to the Honokaa speech.

It is quite true that Mrs. Sawyer's harsh comments did not incorporate Judge Wiig by name. On this circumstance the respondent relies heavily. But there is a totality about a trial, a unit of the judicial process, which is entitled to protection from those who get their license from a judicial temple, especially those who are engaged in the particular trial. During its progress the courtroom is the only proper forum for a lawyer to vindicate his clients. We cannot accept the plea that Judge Wiig was not called by name or identified as thin and six-feet-two. Such a thought is really one that the judge's person, not what he represents, is entitled to protection.

Far different is this from the contempt cases of the Times-Mirror with its editorials and Bridges with his telegram.[10] This is not a contempt case. The Times and Bridges were not court officers charged with the duty of keeping the temple clean. Nor was this a case of a lawyer unconnected with the case commenting at a public meeting or a lawyer who had carried his case past the point of decision, now carrying his cause to the people. Nor was it private grousing among friends to which we assume all lawyers are entitled when legal events are not going their way. It was a public meeting.

We reject the clear and present danger rule of third party contempts which is called upon in Bridges v. California. How could we accept the notion that before a lawyer in the very same case could be disciplined his voice would have to rise to a mighty cacophony reaching the point of causing the audience

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[10]Bridges v. California, 314 U.S. 252.

(a clear and present danger) to march on the courthouse, or to set up such a howl that the judge would be terrified? Maybe for others, but not for counsel of record.

Nor is this a case of a lawyer under strain making an ill-advised speech who later in calmer moments appreciates his error and is humble about it. Respondent is adamant that she only exercised her constitutional right. So, on that she stands or falls. In our view, she falls.

Seriatim we note respondent's points:

1. The specification that Territorial Statute (Section 9701, Re. Laws, Hawaii, 1945) was applied by the court below,[11] so as to deprive appellant of liberty and property without due process of law.

(a) The findings and conclusions are wholly without evidentiary support and unreasonable inferences from the evidence.

(b) Respondent was arbitrarily singled out and adjudged by standards of misconduct other than the usual accepted standards of American Law.

(c) Respondent was arbitrarily singled out and adjudged by standards of proof other than the usual and accepted standards of clear and convincing evidence.

As to this point, with its three subdivisions, our idea is that, respondent's present view of the evidence just isn't correct. And upon her view of the evidence her challenge rests. Respondent overly dissects the evidence and puts too innocent a gloss on it. We find the evidence as a whole amply and adequately justifies

[11] "Section 9701. Qualifications. The Supreme Court shall have the power to examine, admit and reinstate as practitioners in the courts of record such persons of good moral character who are citizens of the United States of America, and who have taken the prescribed oath of office, as it may find qualified for that purpose, but no person shall be examined, admitted or reinstated unless he is qualified under the Hawaiian Organic Act to vote in the Territory of Hawaii and shall have actually registered as such voter; and the Supreme Court shall have the sole power to revoke or suspend the license of any such practitioners or to dismiss or suspend them from the roll of practitioners for malpractice, fraud, deceit or other gross misconduct."

the findings and conclusions. We see no evidence that respondent was arbitrarily singled out.

On subdivision (b) of the point respondent quotes Circuit Judge Soper in In Re Ades (D.C. Md.), 6 F. Supp. 467 at 481, as follows:

> "An attorney does not surrender, in assuming the important place accorded to him in the administration of justice, his right as a citizen to criticize the decisions of the courts in a fair and respectful manner, and the independence of the bar, as well as of the judiciary, has always been encouraged by the courts."

Also, Ex Parte Steinman, 95 Pa. 220, 238, 40 Am. Rep. 637, is quoted:

> "Because a man is a member of the bar, the court will not, under the guise of disciplinary proceedings, deprive him of any part of that freedom of speech which he possesses as a citizen. The acts and decisions of the courts of this state, in cases that have reached final determination, are not exempt from fair and honest comment and criticism. It is only when an attorney transcends the limits of legitimate criticism that he will be held responsible for an abuse of his liberty of speech. We well understand that an independent bar, as well as an independent court, is always a vigilant defender of civil rights." (In re Troy, 43 R. I. 279, 291, 111 Atl. 723, 727-728.)

These cases themselves turn on respondent. Note that Judge Soper says an attorney has the right to criticize "the decisions" of the courts in "a fair and respectful manner." Note that Ex Parte Steinman[12] says, "The acts and decisions of the courts of this state in cases that have reached final determination, are not exempt from fair and honest comment and criticism." This subdivision (b) falls entirely when one reaches the conclusion that the comment was unseemly and certainly at the wrong time.

As to subdivision (c), respondent relies heavily, among other things, upon statements of Professor Rodell of the Yale Law

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[12]Cf. In Re Breen, 30 Nev. 164, 93 P. 997.

School and again upon her most favorable view of the evidence. We would uphold Professor Rodell's right to say from his Yale vantage point just about what he wants to say. But when he speaks he is not simultaneously harassing the very court in which he is trying an unfinished case. Remove respondent's innocent view of the evidence and again the point is without significance.

2. The point that "the statute, inherently and as applied, without appropriate standards, deprives petitioner of freedom of expression contrary to the provisions of the first and fifth amendments. So construed and applied, the statute in operation and effect creates a prior restraint and censorial control over the public utterances of lawyers in derogation of the independence of the bar and the due administration of justice."

We are not familiar with any law that requires a statute for the discipline of lawyers to categorize in detail the lawyer canons. Further, we see no contravention of the first and fifth amendments. When one concludes that during the trial the lawyer of record is under restraints not applicable to the public in general, and perhaps not even applicable to the defendant, the point is answered.

The sub-point listed on the sixth amendment: "To have (that is, a defendant) the assistance of counsel for his defense," we hold has no merit. To be fearless, is not to lay down by night a barrage on the court. Such conduct is the antithesis of bravery or "the assistance of counsel." The sixth amendment does not say such counsel can be entirely uninhibited. Here again on this point (2) respondent's own view of the evidence is the projection from which the respondent makes her argument.

3. The third point is: "The judgment of the territorial court was beyond its jurisdiction and contrary to sound policy governing the relations between local and federal courts because it creates a standard of conduct intimately affecting the administration of justice in the latter. In reviewing that judgment this court will make its own evaluation of the facts and determine its own standard."

In short, the point says: Whatever Mrs. Sawyer did was none of the business of the territorial court because the conduct con-

cerned—the federal court. But the state (here the territory) is the primary jurisdiction that sponsors a lawyer, that mainly presents him to the public. It has an interest. Even had the conduct been in open federal court, still the state has an interest. See In Re Isserman, 9 N.J. 269, 87 Atl.2d 903. Cases may arise like the Isserman type in which the state will feel it should stand by and let the matter be entirely handled on the federal side of the street. But that lends no support for an argument that we should say a state or territory cannot act. Rather should the territory be commended than chided.

Point five is that the judgment of the Territorial Supreme Court is arbitrary and excessive. This last point must necessarily assume that the conduct was relatively innocuous. Respondent was an officer of the court. The term has vitality and is not a transparent euphemism.

In all facets of this case in this court there has been the spectre of jurisdiction. This court does not have general jurisdiction to review the work of the territorial courts of Hawaii.[13] Our only scope is narrowly defined by statute. We do not have the plenary powers here that we might naturally have in such cases as Lavine's, 9 Cir., 217 F.2d 190.

If we have the jurisdiction it hangs by the narrowest thread. We think on the line of such cases as Schware v. Board of Bar Examiners of the State of New Mexico, 353 U.S. 232, and Konigsberg v. State Bar of California, 353 U.S. 252,[14] when the charge is made that respondent has been deprived of due process of law under the fifth amendment and that the result impinges on her rights under the first amendment, we are justified in taking the case to look at it to see if the claims of such

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[13]See 28 U.S.C.A. §1293

"Final decision of Puerto Rico and Hawaii Supreme Courts

"The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

[14]Cf. Bell v. Hood, 327 U.S. 678.

deprivation have any validity. In that sense we have jurisdiction. Then we take the case and, in our view, we find that there was no deprivation of constitutional rights. Thus we complete the chain, and one can then logically argue: therefore we never had jurisdiction.[15] On the whole, after examining the record it is our view that the respondent's position basically has little right to be more than a claim that the territorial court took a different view of the evidence than hers and the judgment is a little too harsh. Such claims we wouldn't hear. So, within the limits of permissible advocacy, we suppose, we find the claims on appeal expanded to include claims of deprivation of constitutional rights, claims which we hold are not solid.

On the second segment of the case, the Fuller affidavit, Mrs. Sawyer's counsel meet it by ignoring it completely in their opening brief. Finally, in their closing brief they say that it is moot because the Supreme Court imposed no punishment thereon. As to that point, we cannot agree. The court at page 426 of its opinion in the Hawaii reports (having first announced the suspension of one year in consequence of the Honokaa speech) then proceeded to the matters incident to the Fuller affidavit and finally concluded with:

> "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order suspending the said respondent licensee from the practice in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller."

To us this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges. However, there is a tinge in the pronouncement which possibly indicates that had the Fuller charge been before it alone it might have not imposed a full year's suspension on that charge; we do not know. If we were reversing the case on the findings and penalty on the first charge, we would (because the matter is not clear) refer the matter back to the territorial court to de-

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[15]Cf. Theard v. United States, 354 U.S. 278, 281.

termine clearly and anew what sanction it intended to apply on the second charge.

The evidence sustains the second charge as appears from the findings of the court's committee and the court itself to which reference is made. It is quite evident, however, that on the second charge alone the respondent would not be able to maintain intact, without breaking, the very thin thread on which we have held there are points which give us the jurisdiction to test the record.

Appellant contends that her punishment applies a different standard to her than has been applied to other lawyers in Territory and that the penalty is too severe; that instead of automatic reinstatement at the end of a year she will have to apply anew—be investigated and take the regular bar examination. Circuit Judge McKinley, sitting pro tem on the Supreme Court, voted for disbarment. That would have been permissible, we think. Many disbarred attorneys become reoriented and again make their way back into the bar.

If the respondent should show some genuine remorse and some appreciation of her error, it might be that the Supreme Court of Hawaii would ameliorate its decision. But so long as she conceives that she has a right to litigate in a given case by day and castigate by night (or at recess) the very court, the honored place in which she is working, berating the conduct of the trial which she will resume on the morrow, she does not deserve to practice law.[16]

We find applicable here much that is said in In Re Howell, 10 N.J. 139, 89 A.2d 652. There Attorney Howell under great provocation by a newspaper editor sought the editor out and severely beat him with both a riding crop and a rubber hose. This was conduct far removed from litigation. The court, per

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[16]Mr. Justice Cardozo when on the New York Court of Appeals said, "Membership in the bar is a privilege burdened with conditions (Matter of Rouss, 221 N.Y. 81, 84, 116 NE 782). The appellant was received into the ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 NE 487.

curiam, quotes Canon 29 of the Canons of Professional Ethics of the American Bar Association to the effect that a lawyer "should strive at all times to uphold the honor and maintain the dignity of the profession and to improve not only the law but the administration of justice." The court continued, "An attorney's responsibility is to the courts, the profession and the public and his misconduct may be of such a nature as to engender disrespect for the law which is his basic trust."

Mr. Justice Brennan, then of the Supreme Court of New Jersey and now of the Supreme Court of the United States, wrote a concurring opinion in the Howell case in which Chief Justice Vanderbilt joined. In it he said,

> "We are a society governed by law, whose integrity it is the lawyer's special role to guard and champion. In that society there is no place for a personal code of justice. The preamble to the Canons of Professional Ethics observes 'The future of the Republic, to a great extent, depends upon our maintenance of Justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.' Canon 29 obligates every member of the bar to 'strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice.' * * * His office is a very badge of respectability and his conduct sullies the office. He 'invites and merits stern and just condemnation.' Cf. Canon 32. His conduct perforce imperils not him alone but the honor and integrity of his profession which depends for its very existence upon public trust and confidence.' * * * Discipline must be imposed not primarily to punish him but to give assurance to the public that the profession is deserving of its trust and confidence and will demand that all lawyers meticulously adhere to the high standards imposed by the profession upon itself."

It is true that Lawyer Howell had entered a *non vult* or *nolo contendere* plea in a trial court to a charge of simple assault and battery; thus the doing of a criminal act was implicitly conceded. But we would think simple assault and battery was

a crime not involving moral turpitude per se. The New Jersey Supreme Court had to go on and examine de novo the special facts of the case, and it did.

Here in Mrs. Sawyer's case the Supreme Court's findings bring us to the same point: she did that with which she was charged. And it should be noted that Howell was abject in admitting his error. Notwithstanding his contrition, the court suspended him from the practice of his profession for six months.

Mrs. Sawyer's conduct has neither the ameliorating circumstance of Howell's rage being instantaneous with perhaps great provocation (and, with only 40 minutes to cool down), nor of his later recognition of his error.

We agree that the censured conduct of respondent was grossly improper.

Judgment affirmed.[17]

In the Matter of Disciplinary Proceedings against Harriet Bouslog Sawyer, a member of the Territorial Bar of the Territory of Hawaii, No. 15,109.

APPENDIX A

REPORT OF LEGAL ETHICS COMMITTEE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

The Legal Ethics Committee, pursuant to a letter from the Honorable Edward A. Towse, dated July 8, 1954, has investigated a complaint filed by the Bar Association of Hawaii and makes this report of the charges, facts and conclusions of the Committee pursuant to Rule 19.

The Charges:

The two charges made in this complaint have to do with (1) the alleged improper conduct of Mrs. Harriet Bouslog Sawyer, re-

[17]Circuit Judge Denman, then Chief Judge, presided at the oral arguments of the foregoing case heard en banc. Between the date of hearing and the date of decision he retired. He now deems it inappropriate that he participate in the en banc decision. Circuit Judge Lemmon heard the oral arguments, but his death occurred on April 26, 1958.

ferred to in this report as "Mrs. Bouslog," in making a speech at Honokaa, Hawaii, on December 14, 1952, and (2) the alleged imprdper conduct in connection with her interview of the juror David P. Fuller, as more fully set forth in the Bill of Partieulars dated September 29, 1954.

The Facts:

The Committee finds that Mrs. Bouslog was one of the attorneys appearing for certain defendants in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, against Charles Kazuyuki Fujimoto, et als., Defendants," being Criminal 10495 in that Court; that on December 14, 1952, during the course of the trial, she made a speech at a public gathering at Honokaa, at which she said, among other things, that horrible and shocking things were going on at the trial; that there was no fair trial in the case; that they just made up the rules as they went along; that unless the Smith Act trial was stopped in its tracks in Honolulu there would be a new crime.

With respect to the charges in paragraph III, the Committee finds that after rendition of the verdict in Criminal 10495, mentioned above, Mrs. Bouslog visited one of the jurors, David P. Fuller, Jr., while he was in a very poor mental and physical condition and thereafter submitted her affidavit concerning an interview with the juror to the Presiding Judge.

While the affidavit of Mrs. Bouslog indicates that on the first occasion he was gravely ill, the Committee finds that she did not fully disclose to the Court the condition of Mr. Fuller, nor the fact that she had attempted to get affidavits from Mrs. Fuller, who refused to sign one, and could not get an affidavit from Mr. Fuller because of his condition.

Conclusions and Recommendations:

The Committee is of the unanimous opinion that the Bar Association of Hawaii has sustained the allegations in paragraphs II and III of its complaint and that Mrs. Bouslog, in imputing to the Judge unfairness in the conduct of the trial, in impugning the integrity of the local Federal courts and in other comments

made at Honokaa, was guilty of violation of Canons 1 and 22 of the Canons of Professional Ethics of the American Bar Association and should be disciplined for the same.

The Committee is likewise of the unanimous opinion that it was improper for her to submit her affidavit concerning the interview with the juror Fuller to the Presiding Judge under the circumstances under which it was submitted. There are differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority think she should be disciplined with respect to the charges in paragraph III.

Dated: Honolulu, Hawaii, June 9, 1955.

Respectfully submitted,

/s/ C. DUDLEY PRATT,
Chairman;
/s/ MILTON RODES,
/s/ CLIFTON H. TRACY,
/s/ E. C. PETERS,
/s/ [Indistinguishable],
Of the Legal Ethics
Committee.

I concur in the findings of the Committee that the conduct of the respondent was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper.

I do not concur in the conclusion that the other members of the Committee have reached with respect to the recommendations we should make to the Court.

This is a proceeding under Rule 19 of the Rules of the Supreme Court. This Committee's authority to act and its duties are set forth in that Rule.

> On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law *and recommendations as to action to be taken* by the Court in the matter * * *

I do not believe the italicized words mean only that this Committee should merely recommend that disciplinary action should or should not be taken. I believe that the Rule means that this Committee has a duty to go further and recommend the nature of the discipline it feels is proper.

I would recommend that, for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper. I believe this to be by far the more serious of the two charges.

I would recommend that, for the conduct regarding the juror which this Committee has found to be improper, she be reprimanded.

Dated: Honolulu, T. H., June 9th, 1955.

/s/ R. G. DODGE.

[Endorsed]: Filed July 1, 1955.

APPENDIX B

Matsuoka's "Notes".

Notes on Mrs. Harriet Bouslog Sawyer's speech at People's theater, Honokaa, Sunday, December 14.

She followed Samuel M. Bento, who said he wanted to say good morning to the Tribune-Herald, pointing generally toward the paper's reporter from Hilo and the paper's Honokaa correspondent who were sitting side by side. Mrs. Sawyer preceded Jack W. Hall. She began speaking at 11 a.m. and ended 11:30 a.m.

Notes on what she said in the order of how she proceeded: The trial is really a trial of Jack Hall to which has been added six others. It's to get at the ILWU.

Said she wanted to tell about some rather shocking and horrible things that go on at the trial.

She was appointed some years ago (3 or 4 years ago) by a court to defend a man who had no money to hire his own counsel. He

was charged with pimping and procuring. The complaining witness in the case was a woman who had been in business 20 years in the territory who claimed she had reformed and repented but this vicious man had driven her back again into the business. It turned out that the hotel where he had kept her had 27 doors unlocked. Likened this to pukas in the Smith act.

Said men in power are trying to put men in jail because of their thoughts. and books written before he was born.

One of the reasons Jack Hall is on trial is because it is said he once got a book, the Communist Manifesto, written in 1898, before Jack Hall was a gleam in his father's eye.

She quoted from manifesto: a spectre is haunting Europe; the spectre is communism. she explained spectre means ghost. said spectre still seems to be haunting people today.

She turned next to conspiracy. noted there was a conspiracy trial in 1937 of filipino brothers. conspiracy to advocate violence and criminal sindicalism. explained conspiracy means agreement. government never has used conspiracy when it had a case. when it hasn't got enough evidence it lumps a number together and says they agreed to do something. the government does not say . . advocated overthrow but says they agreed to. conspiracy means to charge a lot of people for agreeing to do something you have never done.

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touched on myth of agents of fbi. they're supposed to be extra special. radio programs, movies, publicity tell how wonderful they are. but when you see hundreds of tax fraud cases go by and when they spend most of their time investigating people's minds it's time to cut them down to size. said she had told this to a honolulu gathering. labor day? fbi agents should be called federal cops. said has slogan: put away your thoughts here come the federal cops. cops push people around.

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paul crouch. difficult to understand why he's witness. but he was here in 1924; because he was once in Hawaii, so guess that's why. he testified what he did in russia in 1927. he told what he was told by generals etc. usually you cannot testify on what people told you when there is no chance for those to be cross examined.

aileen fujimoto was four years old then. what has crouch's galloping over the plains of russia got any bearing on her. jack hall was 13. but the government goes on with testimony for two weeks on what crouch did between 1927 and 1941 without ever mentioning the defendants.

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he told of infiltration of the armed forces and plots . . . it used to be the idea that a man is responsible for what he did and said—not what someone else did. not a single one of the defendants was of age at the time he's talking about. the jury is not going to pay attention to what Crouch says. but it's the old smear. The prosecution says crouch did this and that and we (prosecution) say the defendants are communist party members so they must have done the same.
but government propaganda has been going on for 10 years before the jurors went into the jury box.

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it's enough to say a person is a communist to cook his goose.
the government says there was an agreement to violate the smith act which was passed in 1940. then the defendants agreed to violate it before it was passed. crouch said he was at a communist meeting in 1941 and saw five or six people there. it was the first time he'd seen them. but he was satisfied when he came to honolulu 12 years later that one was Koji Ariyoshi. she urged audience try to recall what they did 12 years ago. said she can't recall details. god knows no one has a memory that good. yet they use this kind of testimony.

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why? because they will do anything and everything necessary to convict.
some of the witnesses testified differently from what they testified previously. the government knows this but deliberately goes ahead and have him say things in order to convict. mentioned izuka in reinecke trial testimony. said something about izuka saying he didn't know the party advocated overthrow of government until he got out of party.
witnesses testify what government tells them to. just as they read portions of books like overthrow the government and leave

out the rest which says czarist government showing it dealt with russia.

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johnson testimony. said he came back from san francisco with communist hooks and literature in a duffle bag. he said when he got to Honolulu he told Jack Hall the names of some of the books. then the government for two days reads from books supposed to have been in the duffel bag. they're not dealing with what jack hall said. on cross examination johnson said he did not tell the names of the books but just showed jack hall the duffel bag. so jack hall violated the smith act because he saw a duffel bag with some books on overthrowing the government in it. it's silly. why does the government use your money and mine to put people in jail for thoughts

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the government has carried on a barrage of propaganda for many years and expects people in the jury to have hysteria just hearing about communism is enough to jail. said has a friend who worked for sears roebuck and has family of three children and wife. he made a terrible mistake one time. in 1941 he lived in the same house as jack hall. the fbi wanted him to testify. he said i feel jack hall is one of the finest people i have known. apparently the fbi didn't like this. so they suggested to sears and roebuck to fire him because he wouldn't cooperate with the government.

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he wasn't fired so they went to the Los Angeles and Chicago offices of sears and roebuck and convinced them he had to be fired. he was fired because he refused to be a stool pigeon and informer. the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs.

there's no such thing as a fair trial in a smith act case. all rules of evidence have to be scrapped or the government can't make a case.

referred to her habeas corpus move in the palakiko—majors case.

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said a woman came to her with report she heard vernon stevens say he bet a confession out of one of them. she testified but the supreme court refused to let the evidence in because vernon

stevens was not here and had no chance to deny this. with the same situation a federal judge sitting on a federal bench permits crouch to testify about 27 years ago. what was said then. in the previous case it was the life and death of one. and yet here they permit a witness to tell what was said when a defendant was five years old.

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there's no fair trial in the case. they just make up the rules as they go along. the first smith act case was in 1949 of the new york top leaders. attorneys contended they should have the right to say what they did from 1924. medina permitted them to say what the defendants themselves did from 1934 on. but the government can't make a case if it tells just what they did so they widened the rules and tell what other people did years ago, including everything including the kitchen sink.

unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas.

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mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books.

said there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed by so will freedom of thoughts and action. there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places.

she urged audience to go out and explain what a vicious thing the smith act is. people are tried for books written years ago.

APPENDIX C

The Sawyer Explanation to District Judge Wiig
Extract from Transcript of Proceedings in United States v. Fujimoto.

Afternoon Session—December 16, 1952
(The Court convened at 1:15 p.m.)

(Jury absent.)

The Court: Mrs. Bouslog, when were you admitted to practice in this Court?

Mrs. Bouslog: In the year 1941, your Honor.

The Court: Do you remember the date?

Mrs. Bouslog: The certificate, your Honor, hangs in my office, but I believe it was some time in December in 1941. I was notified that I had passed the bar examination in the Territory, as I recall, after Pearl Harbor. So I believe it was the latter part of December in the year 1941.

The Court: I have before me a newspaper clipping from the Honolulu Star Bulletin of Yesterday afternoon in which it purports to quote statements made by you on December 14, 1952, at Honokaa, Hawaii, at a meeting. Do you have anything to say as to the newspaper report?

Mrs. Bouslog: I do indeed, your Honor. I want to say that I welcome the opportunity to state to the Court the substance of what was said at that meeting, and I assure your Honor that the excerpts wrested from the context will not reflect the substance of the context of that speech. Of the words, attributed to me in quotes, I recall clearly that I did say, "There is no such thing as a fair trial in a Smith Act case." I explained, your Honor, the reason for that statement. The reason, I said, was that ideas and books are on trial in a Smith Act case, and that years of propaganda which preceded the enforcement of the Smith Act both by the Government and by the Commercial press has created such an atmosphere of hysteria that the very word "Communism" has become such a deadly label that it is almost impossible for jurors to put out of their minds all they have read and heard outside the courtroom. In substance, your Honor, I said in respect to this statement no more than de-

fense counsel said in the motion on file before this Court for a transfer of the place of trial. In substance, I said no more than what Justices Black and Douglas, dissenting, said concerning the Smith Act in the Dennis case.

The balance of the words other than the ones I have just quoted—which I recall clearly having said—the balance of the words attributed to me in quotes, either I did not say or they are so torn from context as to wholly distort my speech as a whole. Apparently Mr. Walsh is not satisfied to try my clients on sentences or parts of paragraphs ripped from context but he desires to try me on sentences, on portions of sentences and words extracted from the context in which they were said. This, I am sure, that this Court will not permit.

My speech was extemporaneous, an extemporaneous speech, your Honor. I have no notes as to the exact words or the full content. Upon learning, however, this morning from my colleagues that your Honor was going to give me an opportunity to state the substance of the remarks which I did make, I dictated to my secretary the substance of the speech.

I began my remarks by explaining what the Smith Act is and how the prosecution goes about trying a Smith Act case, reading excerpts from books that were written many years before the defendants in this case were born. I spoke of the difference between a Smith Act case and the ordinary criminal case in which a person is tried for what he has done, not for what he thinks—what is in his mind. I explained what a conspiracy is and showed how it can be used to charge a group of persons with agreeing to do what the prosecution cannot prove any single individual did.

In this respect, your Honor, my explanation was drawn from the criticism of the Senior Circuit Judges of conspiracy charges which we cited to your Honor in the brief which we filed and indeed quoted the language of the Supreme Court itself on conspiracy and calling it a dragnet.

My remarks at the meeting at Honokaa concerning the rules of evidence were directed towards the conduct of the prosecuting attorneys in Smith Act cases, how they use a conspiracy charge for the very reason that it permits them to introduce evidence that would not be admissible under the ordinary criminal charge.

I said that in Smith Act conspiracy cases the prosecution had gone beyond the scope of the rules of evidence, even in other conspiracy cases. My remarks were no more in substance than has been stated to this Court in the memorandum filed by defense counsel, submitted in support of the motion to strike the entire testimony of the witness Crouch. In fact, your Honor, my objective in the speech at Honokaa was to state in ordinary language that laymen would understand the content of the decisions of the courts cited in that brief.

The second half of my speech—after speaking generally concerning the tactics of the prosecution in the Smith Act cases and the Smith Act—was devoted to a discussion of the evidence on which the prosecution in this case is seeking to convict Jack Hall and the other six defendants in this case. I used several illustrations. One, I used the testimony of Paul Crouch about riding horses on the Russian plains and talking to a Russian general in 1927. I pointed out the defendants couldn't have possibly cross-examined the Russian general, first, because he had been dead for many years, and second, even if he weren't it would probably be impossible since he is a Russian. I pointed out at the time that Paul Crouch was in Russia, Eileen Fujimoto was five years old and Jack Hall, aged thirteen, was just ready to start high school in Southern California. Yet I said Crouch's testimony of his plotting to infiltrate the Armed Forces and to commit acts of espionage and sabotage while in Russia in the year 1927 was being used against the defendants in this case.

Another illustration that I used from this trial was the testimony of Henry Johnson who testified that some time in 1945 or 1946 he showed Jack Hall a duffle bag and told him it contained Marxist literature. That, although Johnson admitted on cross-examination that he didn't tell Jack Hall what books the duffle bag contained, in effect the fact that Jack Hall had seen the duffle bag was used as a basis for introducing numerous books in evidence which Johnson testified the duffle bag contained.

Another illustration I used was that of the testimony of Ichiro Izuka who testified under oath in the Reinecke case that he didn't learn until after he left the Communist Party that it advocated the use of force and violence, and that therefore his testimony was of no value to the prosecution to prove the crime

charged against these defendants but that nevertheless the prosecution called him and used him in this case to testify to matters completely at variance with his sworn testimony in prior cases.

To illustrate the difference between the application of the rules of evidence in ordinary cases and in Smith Act cases, I told how the Supreme Court of the Territory of Hawaii had refused in the Palakiko and Majors case which involved a question of life and death to permit the testimony of Mrs. Frances Hughes of an admission by Detective Vernal Stevens that he had struck Palakiko before he obtained his statement on the technical ground that no foundation was laid because Vernal Stevens was out of the Territory.

Yet in Smith Act cases I pointed out the prosecution puts on witnesses to testify to things that were said and done by third persons not only on the mainland of the United States but in other countries halfway around the world, and even though the defendants here do not know, have never had any contact with the third persons mentioned and never heard of them before this trial.

I closed my case or my speech by saying that a new crime is being created, the crime of reading. I quoted exactly from, to the best of my recollection, from the closing argument to the jury by the prosecution in the Los Angeles case, in which the prosecution said the defendants asked people to read, read, read, and that they never at any time told people not to read anything. I said that if Smith Act prosecutions continue, the only safe thing will be not to know how to read. And that Smith Act prosecutions, unless stopped, will lead to thought control. I said further that the Smith Act can be stopped here in Hawaii if enough people began to understand the danger of such prosecution.

As the Court can see, my remarks were directed towards the conduct of the prosecution and were not directed towards the Court. By that I do not mean to say that the defense counsel in any way recede from the position that was taken in the brief filed in connection with the Crouch testimony, in which we believe we have cited authorities showing that your Honor had admitted evidence which is not admissible even in the ordinary conspiracy case.

I feel, your Honor, that when the words—and you will note in some cases they are single words—are put back into the context of the whole speech that it must be clear to your Honor that there was no contempt of this Court involved in the speech and that the criticism was directed to the conduct of the prosecution in Smith Act cases.

The Court: Before you sit down, I would like to ask you, did you say at that meeting that things go on at the trial, referring to this trial, that are unbelievable and——

Mrs. Bouslog: No, your Honor, that was not even attributed to me, I believe. That, I believe was not attributed to me even in the newspaper account.

The Court: Did you say that some rather shocking and horrible things were going on in this trial?

Mrs. Bouslog: I have no recollection of that statement. I did undertake to explain in factual terms exact testimony that has taken place in this case, of which I gave the four illustrations which I have cited to your Honor. I have no recollection of those words.

The Court: Did you say that all rules of evidence have to be scrapped or the government can't make a case and just make up the rules as they go along, or words to that effect?

Mrs. Bouslog: No, your Honor. I explained in the substance of my speech that I paraphrased for the laymen the rules of evidence contrasted with the kind of offered evidence by the prosecution in Smith Act cases, all of which is set forth in the memorandum to your Honor in which it is shown that there is a great—that the prosecution seeks great leeway from the ordinary rules of evidence.

The Court: You realize that this trial is still pending?

Mrs. Bouslog: Yes, your Honor.

The Court: And has been pending now for six weeks?

Mrs. Bouslog: Yes, your Honor.

The Court: That you are counsel of record?

Mrs. Bouslog: Yes, your Honor. And may I say, your Honor, that I think there is not one word of what I said at Honokaa that is in any way, that in any way shows any contempt for this Court, that my remarks were directed, as I said, primarily to the conduct of the prosecution in a Smith Act case. And, of course,

more learned and more prominent people than I have said much stronger things concerning the techniques of the prosecution in all Smith Act cases beginning with the Dennis case and all of the pending cases. And those remarks in context were directed generally to the Smith Act cases. Only the specific illustrations from this trial related factually to what goes on in this courtroom.

The Court: Well, Mrs. Bouslog, I am not satisfied with your explanations to the Court. I think this matter requires further investigation. I am going to instruct the U. S. Attorney to make a further investigation of this matter and if he finds under the provisions of Rule 42(b), a Notice and Order to Show Cause should issue, then he will do so.

Mrs. Bouslog: I will say to the Court that I am happy to have any investigation made of what I said. I think perhaps that it is rather unfortunate that the Court refers it to the prosecution whose conduct I was criticizing in the case rather than to an impartial person.

The Court: Well, in that respect, Mrs. Bouslog, if you feel that there is any partiality on the part of the U.S. Attorney, I have no reluctance whatsoever to refer the matter to an independent attorney. I think you should know that throughout this trial I have done everything that I could to assure to the defendants a fair trial. Counsel for the defendants naturally have disagreed with me on some of my rulings on evidence. That is only natural. Or the admission of documents in evidence. But in every other matter there has come up since the time the jury was selected, the matter of fair play on giving the defendants the benefit of the doubt, I have almost consistently done so. It is very surprising to me to read this article in the newspaper after one of your associate counsel, Mr. Wirin, took occasion a week or so ago to come to my chambers during a recess and state that he had been advised or had heard—I didn't ask him the source of his information—that Judge Wiig would not give the defendants a fair trial, and he wanted to state to me at that time that in his opinion the defendants were receiving a fair trial. Again, Mrs. Bouslog, I have done everything I could in this trial to prevent any outside influences from entering into the presentation of evidence and the matters that go to the jury. So

when this case is in their hands it will be decided upon the evidence and what has taken place here in the courtroom.

This publication in yesterday afternoon's paper is the first that I have seen which is contrary to what I had hoped for, what I had hoped would continue throughout the trial. The factual reporting of the principal or the Honolulu Advertiser and the Honolulu Star Bulletin had been, I think, fair. I have noticed no editorial comment or other comments which would in any way have an effect upon giving a fair trial to these defendants. And this caused a great deal of concern when it was called to my attention by Mr. Walsh yesterday afternoon. I trust that nothing will happen from here on which will affect this trial in any way. Will you please call the jury?

Mr. Barlow: Am I to understand, your Honor, that I am going ahead with the investigation?

The Court: Yes.

BARNES, Circuit Judge, concurring, in whose concurring opinion Judges Healy, Fee and Chambers concur:

I agree with Judge Chambers in his holding that the respondent's conduct was grossly improper.

Unquestionably, this Court has jurisdiction in this cause where constitutional objections are raised as to a disbarment proceeding, because the question of according due process of law to the lawyer is always involved. Therefore, this Court has the authority to examine the proceedings. The panel which first heard the cause and now the whole court, with one dissenting judge, agree to this proposition.

Due process of law, both substantive and procedural, was accorded. As the opinion of Judge Chambers shows, the Hawaii Bar Association filed with the Supreme Court of Hawaii a complaint against Harriet Bouslog Sawyer, which contained two charges of professional misconduct. Since Mrs. Sawyer was duly and regularly admitted by the Supreme Court, she was an officer of that court and responsible to it for alleged professional misconduct. In accordance with its own Rule 19, that tribunal referred the cause to its Committee on Legal Ethics and Unauthor-

ized Practice for investigation, which required the Bar Association to furnish a bill of particulars. The Committee held several sessions of the hearing and filed a report containing findings sustaining the charges. The Supreme Court issued an order to show cause, which was directed to and served upon Mrs. Sawyer, who filed a return thereto. Thereupon, the Supreme Court held a hearing de novo. Mrs. Sawyer was accorded the right to and did appear at that hearing in person. She was given the opportunity to be heard, and took full advantage of the occasion. Mrs. Sawyer was given the right to be represented by counsel. Eminent and able counsel of unblemished reputation did in fact vigorously represent her.

The record as a whole, at a minimum, shows that there was not only adequate but substantial evidence to sustain a judgment cancelling her license. Furthermore, irrespective of the dissents, we believe the evidence clearly convincing and sufficient to sustain the judgment beyond a reasonable doubt.

The Supreme Court then suspended Mrs. Sawyer from the exercise of her office, which it had conferred upon her "during good behavior," for professional misconduct, ascertained and declared upon adequate and convincing evidence by the judgment of that tribunal after she was afforded opportunity to be heard both personally and by counsel.

The Supreme Court of Hawaii is not a court organized under Article III of the Federal Constitution, but rather under Article IV, section 3, clause 2 of that instrument.[1] The power of Congress to restrict or abrogate appellate review from such a tribunal is paramount.[2] There is doubt whether appellate courts organized under Article III can be constitutionally burdened with

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[1] "* * * the territorial courts are 'legislative' courts, created in virtue of the national sovereignty or under Art. IV, §3, cl. 2, of the Constitution * * *." **O'Donoghue v. United States**, 1933, 289 U.S. 516, 535; **Ex Parte Bakelite Corporation**, 1929, 279 U.S. 438, 449-450; **Mookini v. United States**, 1938, 303 U.S. 201, 205.

[2] **Ex parte Wilder's Steamship Company**, 1902, 183 U.S. 545. Jurisdiction of this Court over certain final decisions of the Supreme Court of Hawaii is conferred by 28 U.S.C.A. § 1293.

review of administrative functions or housekeeping regulations or determination of a legislatively controlled tribunal.[3]

Even in cases where Congress has permitted review of the territorial Supreme Courts, the appellate courts of the judicial system proceed with extreme caution where local customs, practices or the subtle influences or nuances of customary local law may be present.[4] The same caution should be employed in a parallel situation if local custom of a legislative tribunal dictated that its licentiate should not obstruct the course of justice in another court.

I read the original Matsuoka notes (not the newspaper story thereafter written) as a direct attack upon Judge Wiig's conduct of the trial and his rulings therein; that Mrs. Sawyer charged that "this" was not a fair trial; that Judge Wiig's rulings on evidentiary matters were unfair; that Judge Wiig, with the government prosecutors, "make up the rules as they go along;" that in this case all rules of evidence were "scrapped;" that the conduct of this Smith Act trial was a crime that had to be stopped. How such charges can be characterized as being "devoid of any attack upon Judge Wiig or his Court," or to constitute "not even a scintilla of evidence" of an attack upon the integrity of Judge Wiig, as does my brother, Judge Pope, is beyond my powers of comprehension.

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[3] "* * * this 'Constitutional' court * * * is empowered to act only in justiciable 'cases' or 'controversies' within the meaning of Article III of the Constitution, and so has no jurisdiction to review 'administrative or legislative issues or controversies'." **Boggess v. Berry Corporation**, 9 Cir., 1956, 233 F.2d 389, 392. See also **Application of L.B. & W. 4217**, 9 Cir., 1956, 238 F.2d 163.

[4] **Waialua Agricultural Co. v. Christian**, 1938, 305 U.S. 91, 108-109; **De Castro v. Board of Commissioners**, 1944, 322 U.S. 451, 456.
"Our power to reverse rulings of the territorial court on law or fact is limited to cases of manifest error." **Pioneer Mill Co. v. Victoria Ward**, 9 Cir., 1946, 158 F.2d 122, 125, cert. den., 330 U.S. 838.
"We must note that our jurisdiction to review the action of the Hawaiian courts * * * is a narrow one. * * * the question is what standards of fundamental fairness * * * are required by the Fifth Amendment, and whether those standards were here complied with." **Palakiko v. Territory of Hawaii**, 9 Cir., 1951, 188 F.2d 54, 60, cert. den., **sub nom, Palakiko v. Harper**, 347 U.S. 956; **Alford v. Territory of Hawaii**, 9 Cir., 1953, 205 F.2d 616, 617-618.

Whether such acts charged to Judge Wiig were "shocking and horrible" is beside the point. Mrs. Sawyer chose to characterize them as such.

To conclude that Mrs. Sawyer was referring to Smith Act cases generally, and to "all Smith Act cases," but was not referring specifically to this one case then on trial, is to my mind nonsense. *Her* attorney at the trial clearly understood "that this was a talk about what was going on in the Smith Act trial here in Honolulu. Now let's not fool ourselves about that. We're lawyers here." Mrs. Sawyer said: "Unless we stop *the* Smith [Act] trial in *its* tracks *here* there will be *a new crime.*" Mrs. Sawyer was then and there referring to but one Smith Act case; *the* Smith Act case then before Judge Wiig. Any other interpretation flys in the face of reality and renders the English language not understandable.

The point urged by Judge Pope that "Judge Wiig did not rule upon Crouch's testimony until long after the speech," seems to me to compound the offense rather than excuse it. If the court had not yet made its ruling on admissibility, even more reason existed why Mrs. Sawyer should not attempt to influence the court's subsequent order by inflaming her audience outside the courtroom during the trial's progress. This was a criminal trial by jury who were not impounded but were permitted to mingle with the community when the court was not in session. Even customary media of communication are restricted to "fair comment" in reporting the proceedings.

To me, this case no more involves "freedom of speech" in its constitutional sense than do the rules of court which permit a judge to require an attorney (whether he represents Smith Act defendants or the government or any other litigant) to take his seat in a courtroom, and to refrain from further statement. An attorney, acting as such during the trial of a case, must be subject to certain restrictions upon what he may say or do. To that extent he has lost a certain freedom of speech, and a certain freedom of conduct. To that extent such loss of freedom is a necessary adjunct to the intelligent and orderly enforcement of all litigants' constitutional rights, including those clients the disciplined attorney represents. The attorney need not give up his

complete freedom if he prefers not to act as an officer of the court in the trial of a case. When he purports to so act, whether through preference or in response to duty, unless he is to be bound by the reasonable rules of the court governing all cases tried therein, he advocates that anarchy should rule.

I concur in the affirmance.

POPE, Circuit Judge, with whom HAMLEY, C.J. concurs, dissenting.

I have a very different view of what the facts are in this case. The majority accept the conclusion of the Hawaii court that appellant "engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, . . ."[1] I am satisfied that there is nothing in the record to support that statement. I think this is one case in which it is peculiarly important that we scrutinize with care the proof as to just what did happen.

If appellant used the precise words and made the exact statements that those who testified against her say she did, there is a

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[1]The paragraph in full reads as follows: "Upon its finding and conclusion as stated, supra, this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to-wit, the case entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants,' being criminal number 10,495 in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, contra to the obligations and duties assumed, as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct."

serious and substantial question as to whether the judgment below does not violate her rights under the First Amendment. This is no ordinary case. It is the case of one who has a record of defending persons accused of crime, of representing unpopular labor unions, and of even going so far as to appear for Smith Act defendants. I cannot overlook as a judge what I know as an ordinary citizen in common with every one else, that many persons think that one who would handle such cases as has the appellant ought to be disbarred just on general principles. And when the Supreme Court of Hawaii arrives at a conclusion couched in the language just quoted, which finds no counterpart in any word or statement in the record, I consider it my duty to inquire with care whether such statement really represents the facts of the case.

That we are not limited in our examination of the facts is plain since the Supreme Court heard no testimony but heard the case solely upon the written record and "made its own evaluation thereof" "unprejudiced by the report of the legal ethics committee." Our duty, as a federal court, to find the facts for ourselves in the process of determining whether appellant's claim of a federal right under the Constitution, has been frustrated by erroneous conclusions of the Territorial Court, is recognized by the Supreme Court of the United States. That Court, when reviewing a state court decision under circumstances similar to those here, insists on finding the facts on which the constitutional right turns, for itself. As stated in Stein v. People of State of New York, 346 U.S. 156, 181: "Of course, this Court cannot allow itself to be completely bound by the state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."[2]

Our power to review decisions of the Supreme Court of Hawaii is substantially the same as that exercised by the Supreme Court of the United States in reviewing final decisions of the highest

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[2] "But the prior State determination of a claim under the United States Constitution cannot foreclose consideration of such a claim, else the State court would have the final say which the Congress, by the Act of 1867, provided it should not have." Brown v. Allen, 344 U.S. 443, 500.

courts of the states.[3] At least ever since Kansas City So. Ry. Co. v. Albers Comm. Co., 223 U.S. 573, that Court has stated the rule as follows: "In cases brought to this court from state courts for review, on the ground that a federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted federal right has no basis in point of fact or has been waived or lost, this court as an incident of its power to determine whether a federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. (cases cited) Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question to analyze the facts." Truax v. Corrigan, 257 U.S. 312, 324-325. This rule has been announced on numerous subsequent occasions.[4] It is an everyday practice in the review, by the Supreme Court, of state court decisions. Thus in Schware v. Board of Bar Examiners, 353 U.S. 232, where Schware claimed he had been denied a constitutional right, the Court examined the facts for itself, and at great length, and posed the matter for its decision as follows, (p. 239): "Therefore the question is whether the Supreme Court of New Mexico on the record before us could reasonably find that he had not shown good moral character." It concluded, (p. 246): "There is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law." Hence, it was held, the state had deprived him of due process of law.[5] Other cases in which the Supreme Court, in considering claims of infringement of constitutional rights, found the facts for itself are Fikes v. Alabama, 352 U.S. 191; Leyra v.

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[3]Cf. Prensa Insular de Puerto Rico v. People of Puerto Rico, 1 cir., 189 F. 2d 1019, 1021, which examines the history of the same jurisdictional Act.

[4]Such, for example, as Drivers Union v. Meadowmoor Co., 312 U.S. 287, 293; and Fiske v. Kansas, 274 U.S. 380, 385.

[5]The concurring opinion, rejecting the state court's finding that petitioner was "a person of questionable character", called it "so dogmatic an inference as to be wholly unwarranted." (p. 251)

Denno, 347 U.S. 556; Konigsberg v. State Bar, 353 U.S. 252; and Moore v. Michigan, 355 U.S. 155.[6]

When the facts of this case are thus examined, it should be readily apparent that they do not justify or warrant the conclusion of the Hawaii court above quoted. To assert, as did that court, that the remarks made by appellant, either as charged in the complaint against her, or as shown by the evidence when taken most strongly against her, was a "wilful oral attack upon the administration of justice in . . . the said United States District Court", and that she "by direct statement and implication impugned the integrity of the judge presiding therein", is, it seems to me, to use the language of Mr. Justice Frankfurter in the Schware case, supra, so dogmatic an inference as to be wholly unwarranted, and so arbitrary as to be offensive to due process. Wieman v. Updegraff, 344 U.S. 183, 192; Slochower v. Board of Education, 350 U.S. 551, 559.

I shall discuss, infra, the question whether, even if appellant had made an attack upon Judge Wiig, she exceeded the bounds of an attorney's certain right to criticize a court or judge. But that question is a hypothetical one, for, as I shall show, appellant did not attack the court or the judge. I shall first proceed to show what the record states she did say; and when the facts of the case are viewed as they really are, it becomes manifest that the order of suspension is not only arbitrary and a denial of due process, but an unjustifiable infringement upon appellant's right of free speech under the First Amendment.

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[6]Cf. also, Lambert v. California, 355 U.S. 225, where it was held conviction under an ordinance was a violation of due process in view of the fact, which the Supreme Court found, that petitioner had no knowledge of the requirements of the ordinance. Another recent case which shows the same approach where there was a claimed denial of the right of free speech, is Staub v. City of Baxley, 355 U.S. 313, 318. The question was the sufficiency of the pleadings to present the point in the state court. It was asserted this was a question of local procedural law. The court held: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law; . . . and the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

The most complete and most nearly contemporaneous account of just what appellant did say at the Honokaa meeting is found in the notes made by a newspaper reporter who attended the meeting and the following day wrote a newspaper account of it. A week later he was asked by his editor to transcribe his original handwritten notes and he did so filling them out and making them understandable to the reader.[7] While appellant denies making some of the statements found in the notes, for the purposes of this opinion I take the version shown by the notes. The majority opinion, for the purpose of indicating what happened at the meeting, quotes the newspaper account on the ground that the Hawaii court accepted that as accurate. The reporter, at the hearing, some two years after the speech was made, did not testify that the newspaper story was an accurate statement of what transpired. He merely stated that he wrote the story "based upon the notes . . . made during the speech." My objection to its use is not because it is mere hearsay, but it could furnish an excuse for not examining the facts. No one can claim to know what this case is about unless he has read, with care, the full notes of the speech made by the newspaper reporter. They appear as Exhibit B attached to Judge Chambers' opinion.

The newspaper account gives no support to the Hawaii court's conclusions. But in arriving at the facts here it should be noted that the story is distorted, for the reporter has selected, as no doubt most reporters would do, only the most startling portions of the speech,—the parts containing the best headline material.

But when all the notes are read, an unmistakable picture of just what kind of speech was made, and what it was about, clearly emerges. What we have here is an attack on the methods used in all Smith Act prosecutions, including the one then pending, and hence, implicitly an attack on the Smith Act itself. The notes show exactly what appellant talked about. It was as follows: (a) Men in power are trying to put men in jail for what they think and what they read; (b) the prosecutions are for conspiracy—when the Government charges conspiracy, it has

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[7]The original handwritten notes, taken at the meeting, had been given to the FBI by the reporter. They were not produced and the record shows no serious effort by the Bar Committee to obtain them.

no case—"conspiracy means to charge a lot of people for agreeing to do something you have never done"; (c) The FBI's special agents, widely publicized as wonderful, spend their time investigating people's minds, while hundreds of tax frauds go unprosecuted; (d) Among the agents so used were Paul Crouch and Johnson;[8] Crouch testified what he was told by generals when he was "galloping over the plains of Russia" at a time when one of the defendants was four years old, while Johnson testified he carried some Communist books from San Francisco to Honolulu, in a duffle bag, and showed the bag to Jack Hall; (e) On the strength of this the Government "for two days reads from books supposed to have been in the duffle bag . . . so jack hall violated the smith act because he saw a duffle bag with some books on overthrowing the government in it. its silly;" (f) Crouch testified to things he couldn't possibly remember. Yet they use this kind of testimony. (g) "Some of the witnesses testified differently from what they testified previously." (h) "witnesses testify what government tells them to"; (i) "they will do anything and everything necessary to convict"; (j) "the government has carried on a barage of propaganda" and "expects people in the jury to have hysteria just hearing about communism is enough to jail"; (k) an account of a Sears Roebuck employee who knew Hall. When he refused to testify against Hall the FBI asked his employer to fire him,—when he was not fired they went to the Los Angeles and Chicago offices of the employer and convinced them he had to be fired; (l) "the government gets away with it by making people fear that if they don't do as it wants they'll be branded red and lose their jobs, there's no such thing as a fair trial in a smith act case. All rules of evidence have to be scrapped or the government can't make a case"; (m) in the Palakiko-Majors case[9] the court would not let a woman testify she heard a police officer say he beat the prisoner, because the officer was absent and had no chance to deny it, yet the judge permitted Crouch "to testify about 27 years ago. what was said then", at a time "when the defendant was 5 years old." (n)

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[8]The Fujimoto record indicates this was not Manning Johnson but a Henry Johnson.

[9]See Palakiko v. Harper, 9 cir., 209 F. 2d 75.

"there's no fair trial in the case. they just make up the rules as they go along"; (o) A reference to the New York Smith Act case: "the government can't make a case if it tells just what they did so they widened the rules and tell . . . . everything including the kitchen sink"; (p) "unless we stop the smith trial in its tracks here there will be a new crime. people will be charged with knowing what is included in books. ideas." (q) "mentioned los angeles trial in which someone said there was no evidence that someone had instructed persons not to read some books"; (r) "there'll come a time when the only thing to do is to keep your children from learning how to read. then not only will unions be destroyed but so will freedom of thoughts and action, there'll be dark ages of thought control when people won't be able to speak freely in taverns and other places"; (s) "urged audience to . . . explain what a vicious thing the smith act is. people are tried for books written years ago."

The most interesting thing about this near-contemporaneous record of the speech is that it is devoid of any attack upon Judge Wiig or his court. The only reference to the judge was the criticism of his ruling (item "m" above) on the admission of the Crouch testimony. But this was no attack on his integrity. Aside from this the judge was not even referred to. His name was not mentioned. These notes of the reporter are of special importance here, not merely because they were made when his memory was fresh, but also because, as I shall shortly show, they were confirmed by the other witnesses who testified. In short, the notes are a fair summary of all the evidence.

This record does not warrant a conclusion that the integrity of Judge Wiig was attacked. Everything in it is consistent with appellant's position that the speech was directed at Smith Act prosecutions and the Smith Act, and not at Judge Wiig personally. Some of the remarks quoted in the notes she denied making, but I assume for the purposes of this opinion she made all of them, just as the notes show.

Take the statement about "some rather shocking and horrible things that go on at the trial." Have a look at the notes. This remark is made at the beginning, obviously by way of introduction of what she proposed to tell as she went along. The meaning is

plain. I am about to tell you some rather shocking and horrible things that go on. What these "horrible and shocking things" were she specified in detail, extending the itemization to Smith Act trials generally. These were: the use of conspiracy counts; the use of such witnesses as Crouch and Johnson; the use of such "silly" testimony as that given by them; the Government's knowing use of witnesses whose testimony was contrary to that previously given; the Government's propaganda intended to give juries hysteria. Nowhere is there any "shocking and horrible" thing charged to the judge—the specific acts recounted are charged to the Government; to its means of prosecution, and to the Smith Act itself. No witness testified that in this connection, or at any place in the speech, was there any mention made of Judge Wiig.

The Hawaii court wholly failed to consider the context in which the "shocking and horrible" words were used. Its opinion lumps these words with other supposed quotations from the speech, wholly without any attempt to analyze the phrase as the opening of a 30 minute speech. As quoted by the court, appellant said "that a fair trial was impossible." On such truncated quotation it is sought to show that this was a remark limited to the Fujimoto case alone, rather than addressed to Smith Act trials generally, as appellant testified. The notes, read in their entirety, as well as the other testimony, fully disclose that she was discussing all Smith Act cases.

The notes show she said: "There's no such thing as a fair trial in a Smith Act case." After contrasting the exclusion of hearsay in the Palakiko case with the use of Crouch's testimony about what happened 27 years ago, she continued "There's no fair trial in the case. They just make up the rules as they go along." That by this she was still referring to all Smith Act cases is apparent, for she proceeded immediately to illustrate this by describing how this was done in the New York Smith Act case in 1949, with her reference to "everything including the kitchen sink." These were not different speeches—all occurred in the same 30 minutes. No part may fairly be read out of context.

John D. Morse, a witness called by the prosecutors, who was Industrial Relations Director of Honokaa Sugar Company, testi-

fied as follows: "Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said."

The next mistake in the Hawaii court's statement is its recital that she said "that all of the rules of evidence *were being scrapped* so the government could make *its case.*" (Emphasis mine) So worded it seems to refer exclusively to what was *presently* going on in Honolulu. But the notes have her saying, immediately following a reference to any Smith Act case: "All rules of evidence *have to be scrapped* or the government can't make *a case.*" (Emphasis mine)

This remark, too, when read in context, clearly was not directed against the judge. As the notes show, it was immediately followed by her illustration of the distinction between other trials and conspiracy trials by reference to the Palakiko habeas corpus case where hearsay was excluded contrasted with the present conspiracy trial where "they permit a witness to tell what was said when a defendant was five years old." This is the same idea she expressed in her reference to the New York trial. A large part of the talk was devoted to her claim of the excessive breadth of conspiracy trial evidence. As appellant explained to Judge Wiig, this remark about rules of evidence having to be scrapped, referred to the use of declarations of third persons in conspiracy cases. There is no proof whatever that it was used otherwise. And the prosecution witness Ferreira testified: "Q. Just tell the Committee to the best of your recollection what Mrs. Bouslog said. A. She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and 'conspiracy' was explained to us, not the exact wording, but was something that

they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy."

The final statement listed in the Hawaii court's opinion is that referring to "stopping the Smith trial in its tracks." Taking it as it appears in the notes, and disregarding a slight inaccuracy in the court's version, she said: "Unless we stop the Smith trial in its tracks here there will be a new crime. People will be charged with knowing what is included in books. Ideas." Just what this statement, so recorded by the reporter, meant, is not explained by any proof offered by the prosecutor. The one thing clear about it is that it could have no reference to Judge Wiig. On the face of these exact words I would think stopping the Smith trial in its tracks would mean getting a verdict of acquittal. Or it might mean what actually happened to the case. See Fujimoto v. United States, 251 Fed. 2d 342 (Jan. 16, 1958). Appellant herself gave an explanation. Denying these were the exact words, she said: "I did state in substance something that is reminiscent of that. I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control, and I quoted, as I told Judge Wiig—I quoted the exact language of the prosecutor in the Smith Act trial in Los Angeles, where he had said that all the defendants did was ask people to read, read, read, and they never told people not to read anything. And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was."

No other witness testified as to this statement. But the reporter's notes tend to confirm her explanation for they show the remark was followed by the reference to reading made in the Los Angeles trial. The confirmatory value of those notes is particularly striking since just two days after the speech, and nearly a week before the notes were typed, and when appellant could not have known what was in them, she gave precisely the same explanation to Judge Wiig. Whether her explanation that she was advocating repeal of the Smith Act be accepted or not, there is no proof whatever that it had any more serious import.

As a final step in analyzing the evidence I allude to a statement which is not listed in the complaint or the opinion, but which appellee seems to think tends to show appellant was directing her talk against Judge Wiig. This is the statement "They just make up the rules as they go along." The use of the pronoun "they" is clear enough. It is in the reporter's notes. All the witnesses who referred to this statement said "they", or "the Government" in connection with the phrase. That this "they" referred to the Government is clear from the whole context. Previous to this phrase, the notes show appellant was throughout talking of the Government. The *Government* "when it hasn't got enough evidence it lumps a number together"; "the *government* does not say advocated overthrow but says they agreed to"; "the *government* goes on with testimony for two weeks on what crouch did"; "the *prosecution* says crouch did this and that"; *Government* propaganda has been going on "the *government* says there was an agreement to violate smith act"; as to witnesses telling conflicting stories, "the *government* knows this but deliberately goes ahead"; "witnesses testify what *government* tells them to"; "then the *government* for two days reads from books"; "the *government* has carried on a barrage of propaganda"; "the *government* gets away with it by making people fear". When all this is followed by "They just make up the rules as they go along", it is absurd to say that appellant was now including the judge in the "they". Appellee argues that as a matter of course it is the judge who makes the rules. The trouble with this is that the evidence does not show she made any such statement. And its improbability appears from the fact that when the speech was made Judge Wiig was still reserving ruling on much of the evidence. All significant rulings were made by Judge Wiig late in the case and long after the speech.[9a]

A proceeding of this kind cannot be founded upon such dubious evidence;—a judgment of disbarment or suspension[10]

[9a]This I develop later. See text opposite footnote 19 infra.

[10]Appellant claims that in her case suspension means the same as disbarment, since Rule 15 (d) of the Territorial Supreme Court, adopted October 3, 1955, requires a lawyer once suspended to start all over, proving his worthy character, and passing a new bar examination. Apart from that I see no difference, for the purposes of this case, between a disbarment and a suspension.

cannot be supported by that kind of proof. The power to order disbarment "is one that ought always to be exercised with great caution; and ought never to be exercised except in clear cases of misconduct, which affect the standing and character of the party as an attorney." Ex Parte Wall, 107 U.S. 265, 288. See accord, In Re Spicer, 6 Cir., 126 F. 2d 288, 289. "It is settled that charges of unprofessional conduct on the part of an attorney should be sustained by convincing proof and to a reasonable certainty and that any reasonable doubts should be resolved in favor of the accused." Brawner v. State Bar of California, 48 Cal. 2d 814, 313 P. 2d 1, 3. This requirement of clear proof is insisted upon by the courts generally.[11]

In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally.[12]

Upon these facts it is impossible to avoid the conclusion that what appellant had to say did not overstep the limits of that freedom of speech guaranteed by the First Amendment. As I shall hereafter demonstrate, her right to discuss and criticize the mode of prosecution of Smith Act cases extended not only to cases previously tried, but to the pending case as well. That the Honolulu case was still pending made no difference whatever, as Bridges v. California, 314 U.S. 252, and the cases which followed it, discussed hereafter, abundantly show.

Why appellant chose to make such a speech to that audience and at such a time and place is difficult to comprehend. It seems

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[11]The cases are collected in 7 C.J.S. "Attorney and Client", §33, pp. 784-785.

[12]So far as her attack on the Smith Act is concerned, it is of interest that she could not have foreseen that if she would but hold her fire, she might have saved herself some trouble. Her timing was poor. The decision in the Yates case, 354 U.S. 298, if we take the words of Judge Chambers for it, left that Act "a virtual shambles". Fujimoto v. United States, 9 Cir., 251 F 2d 342 (Jan. 16, 1958). At any rate, her clients went free. (Of course the majority of the court who sat with Judge Chambers did not concur in his statement that the Act was a shambles. Nor would I. All Yates did was to show that the Act punished only incitement to action, and not mere advocacy of doctrine.)

probable that few, if any, of her audience had any understanding of what she was saying, and it cannot be believed that she thought any one present could do anything about repealing the Smith Act. I assume that the Union, under whose auspices the meeting was held, was being urged to help in the defense. Its Regional Director, Hall, was one of the defendants. A report to the union on the progress of the trial, which had just begun, would of course be in order; and a simple appeal for funds should serve to secure financial aid, if that were her purpose. But this particular speech, which, in view of the temper of the times was bound to cause her trouble, must have been undertaken, I think, primarily as a means of expressing a bitter resentment at what she thought were monstrous injustices.

But whether I can find reason for that speech, and my own disagreement with it are wholly irrelevant. In the words of Judge Pound: "Although the defendant may be the worst of men . . . the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected."[13] That speech is unreasonable, exaggerated, and offensive, does not deny it freedom. Speaking for the Court in Cantwell v. Connecticut, 310 U.S. 296, 310, where the words of the defendant were especially outrageous, Mr. Justice Roberts said: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[14]

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[13]People v. Gitlow, 234 N.Y. 132, 158.

[14]In Near v. Minnesota, 283 U.S. 697, Chief Justice Hughes made the same point by quoting from Madison. (p. 718) "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the

Freedom of speech is not absolute. It may be limited where the facts show a "clear and present danger."[15] But most assuredly freedom of speech does not mean freedom of speech that is true, or sound, or reasonable. It means freedom of speech, period. Freedom means nothing unless it includes freedom for those we hate.[16] Freedom of speech is only a delusion unless it means freedom for others to express what we detest. Though a speech "stirred people to anger, invited public dispute, or brought about a condition of unrest," punishment for making it violates the First Amendment. Terminello v. Chicago, 337 U.S. 1, 5. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263. In its broad scope it draws no line, it does not exclude lawyers, or even lawyers who represent the ILWU or persons claimed to be Communists.

In thus making an attack upon the Department of Justice,—"the Government"—for the manner in which it was prosecuting

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wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?'"

[15]Schenck v. United States, 249 U.S. 47, 52.

[16]Cf. Girouard v. United States, 328 U.S. 61, 68, quoting Mr. Justice Holmes in the Schwimmer case, (279 U.S. pp. 654-55): "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

Smith Act cases, appellant listed many items of grievance. She criticized the use of the conspiracy technique;[17] she criticized the use of "agents of FBI" generally, and of Crouch and Johnson in particular; she criticized the use of the Government's "barrage of propaganda", and charged the FBI with pressuring Sears Roebuck to "fire" a man because he would not testify against one of the defendants. She charged that the prosecution would "do anything and everything necessary to convict"; that "witnesses testify what the Government tells them to". She urged her audience to tell "what a vicious thing" the Smith Act is. "People are tried for books written years ago."

As I read the newspaper reporter's notes of the speech it seems to me that the prime subject of her speech was Crouch, and other Government witnesses. She alluded to her Honolulu Labor Day speech in which she had discussed professional witnesses, former Communists now paid by the Government. She did not otherwise identify Crouch,[18] The fact that appellant's principal complaints related to the use of Crouch and to his testimony, and similar testimony of other witnesses, sharpens up the point that there was no attack on Judge Wiig. The record in the Fujimoto case is here and is available to us. Latta v. Western Inv. Co., 9 cir., 173 F. 2d 99, 103; United States v. Pink, 315 U.S. 203, 216. Judge Wiig did not rule upon Crouch's testimony until long after the speech, indeed, nearly three months later. Then, on March 10, the court ruled on motions to strike this and other testimony which had been received subject to motion to strike. (Some of Crouch's testimony was then stricken along with that of some others.)[19]

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[17]A classic discussion of that subject is that of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440, 445.

[18]He was the Paul Crouch, who with Manning Johnson and Matusow, were described in Communist Party v. Control Board, 351 U.S. 115, as "three perjurious witnesses."

[19]The record there shows that the Government's case was built largely around Crouch and his testimony. He was the lead-off witness. He was on the stand from November 12 through November 24, and his testimony covers 962 pages. As the Government briefs in that case show, the case was based upon the theory of Marxism-Leninism. The briefs emphasize the importance attached to proof of that theory by the prosecution. Crouch was the witness on whom they depended for this proof. He testi-

One cannot fairly find in this speech any attack upon the integrity of the judge. Proof of any such thing is completely wanting. There is not a scintilla of evidence to that effect—far less the "clear and convincing evidence" which such a case requires.

When it is recognized that there was no attack on the integrity of the judge, the whole case collapses. Stripped down to its actual facts the judgment of the Hawaii court means no more and no less than that for such an attack on the Department of Justice, an attorney may be disciplined by suspension from practice. True, the court below never got down to stating the proposition in those simple terms. Its faulty findings were masked with generalities like "attack upon the administration of justice", and "disrespect for the courts." Surely no one argues that a lawyer may be disbarred for an attack upon the Department of Justice.

The freedom of speech of the First Amendment is a peculiarly American concept. Historians have shown,[20] and the Supreme Court has held that this amendment was not, like some other provisions of the Bill of Rights, a mere adoption of rules deeply rooted in English common law at the time of the Constitution. "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed." Bridges v. California, supra, p. 265.[21]

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fied as an expert on the Communist Revolution and the theory of the Communist Conspiracy, the Comintern, the Red Army, and Red Army materials. According to the witness he himself was on an executive committee of the Communist International to draw up a plan for infiltration of the armies of the capitalist countries. The witness testified he arrived in the Soviet Union in 1927. He was asked: "Q. And while you were in Russia, what did you do and did you meet any person?" When this was objected to, upon Government counsel's statement that he would later "tie the testimony in" the witness was allowed to proceed subject to motions to strike.

[20]Zecharish Chaffee, Jr., "Free Speech in the United States", Chap. 1.

[21]The Court quoted (p. 264) Madison's statement that "The state of the press . . . under the common law, cannot . . . be the standard of its freedom in the United States."

And this amendment is not only first in number but first in importance of those ten amendments. Cut off freedom of speech, or of the press, and you stop the very lifeblood of a democracy which may live and function only if knowledge and opportunity for discussion are available to all. As Madison said: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: and a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[22] In United States v. CIO, 335 U.S. 106, 129, 144, Mr. Justice Rutledge, speaking for himself and three other justices concurring, said: "The most complete exercise of those [First Amendment] rights is essential to the full, fair and untrammeled operation of the electoral process. To the extent they are curtailed the electorate is deprived of information, knowledge and opinion vital to its function."

Another reason why attacks on the freedom of an individual to speak must be struck down is the way in which the consequence of a single failure to respect that right may spread, like a mantle of fear, over the whole nation. Suspending one person like Harriet Bouslog Sawyer from the practice for one year is not merely the imposition of punishment on her. In upholding this judgment this court serves notice on all lawyers everywhere to hold their tongues, to watch their speech, lest some court hold criticism of a state or federal prosecutor's procedures be ground for disbarment. The very thought that such a proceeding as this might be started would be enough to dry up criticism of government prosecutions no matter what abuses may exist. That is why this freedom is of the very essence of liberty. Let the courts tolerate one single instance of punishment for exercising freedom of speech, and all who heard of it, if they be men of caution, will instantly cease to be free. "When you put the hotheads in jail, these cooler people do not get arrested—they just keep quiet. And so we lose things they could tell us, which would be very advantageous for the future course of the nation. Once the prosecutions begin, then the hush-hush begins too. Discussion becomes one-sided and artificial.

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[22]Letter to W. T. Barry, August 4, 1822.

Questions that need to be threshed out do not get threshed out." Chaffee, supra, loc. cit. 561.

Infringement of freedom of speech destroys thought itself. Instead of inquiring:—"Are these the facts?" "Do I believe this?" we would be asking: "If I think this way, and say so, will I be considered 'controversial', or 'disloyal', or 'subversive'? Will it cause me trouble?" In his recent Reith Lectures at Oxford University George Kenhan noted the Russians' "systematic abuse of the human intellect"; "the fact is that the Soviet leaders are the first and leading victims of the abuses they have practiced so long on the freedom of the mind."

The contention here is that appellant cannot claim to be in the position of an ordinary critic of the Department of Justice, for in attacking what went on in Judge Wiig's court she necessarily included the judge for he must have permitted it. Evidence criticized, it is said, was necessarily that which the judge admitted. Furthermore, goes the argument, appellant was violently attacking proceedings in a case in which she was counsel. She was trying her case in a public meeting, with a view to influencing the outcome, and this, it is said, is a violation of a lawyer's professional obligation. This position, I think, will not bear analysis.

In the first place, if we examine what appellant was really saying, it is clear that there was no charging of Judge Wiig with these things. To say she must have been blaming Judge Wiig for Crouch being a witness, or for his testimony is not correct. Of course no one could think the judge selects the witnesses, or thinks up what they shall be asked. The use of the conspiracy form of indictment was, as anyone would know, something chargeable only to the prosecution. I have previously noted, supra, (text opposite note 19), that the important rulings on the admission of testimony came long after the date of this speech;—they certainly were not included in the condemnations of the talk.

But even if rulings admitting evidence, and other rulings on points of law had been the subject of appellant's attack, nothing is more plain, I think than that courts are properly subject to such criticism, and freedom of speech in that direction is within

the First Amendment protection. While Mr. Justice Frankfurter, in his opinion in Bridges v. California, 314 U.S. 252, 284, was dissenting, yet it is clear the whole Court would approve his statement: "Of course freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power." And he quoted in a footnote from a speech by Mr. Justice Brewer, (p. 289): "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgment subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

Suppose appellant had said: "They produce these witnesses like Crouch, and he testifies to what somebody said when Aileen Fujimoto was only four years old," and then added: "and Judge Wiig lets them do it." We must remember that the test of judicial or legislative power to restrict freedom of speech is the "clear and present danger" standard. The notion that even a direct reference to Judge Wiig, such as that in the supposititious statement I have just assumed, could be a clear and present danger to the fair administration of justice in Judge Wiig's court is manifestly absurd. Such restrictions on appellant's right to speak as were imposed by this judgment are subject to the condemnatory language of the court in Bridges v. California, supra, (p. 270): "If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. It appears to be double: disrespect for the judiciary; and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of

American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect. . . . We must therefore turn to the particular utterances here in question and the circumstances of their publication to determine to what extent the substantive evil of unfair administration of justice was a likely consequence, and whether the degree of likelihood was sufficient to justify summary punishment." Then, after discussing the language used in the statements there involved, the Court concluded, (p. 278): "The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here: 'I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words.' "

The same test was applied in Pennekamp v. Florida, 328 U.S. 331, 348, and Craig v. Harney, 331 U.S. 367, 376. In the latter case, the Court, speaking of the Constitutional limits on the power of a court to punish for contempt, said: "This was strong language, intemperate language, and, we assume, an unfair criticism. But a judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. . . .' . . . The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely a likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. . . . But the law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular judge and the matter pending before him as to cross the forbidden line. But the episodes we have here do not fall in that category. Nor can we assume that the trial judge was not a man of fortitude."

The significance of these three cases, (Bridges, Pennekamp, Harney) is that although they dealt with contempt proceedings, the basis of the decision in each case was the constitutional limitation. The same absence of a clear and present danger which voided these contempt orders would make the Hawaii court's judgment in this case a prohibited restriction on free speech even if the speech had expressly included the judge in the supposititious manner indicated. I take it no one will contend that conduct which could not validly be punished as contempt may nevertheless be disciplined by suspension from practice.

The three cases last mentioned also completely dispose of the suggestion that attack may not be made on proceedings in court in a *pending* case. The Supreme Court dealt with that question at length. Of course, the possibility of clear and present danger to the functioning of a court of justice from certain speech or publication could occur if they were directed to pending proceedings.[23] But the facts of this case present no such situation. That a speech in a town of 1000 population,[24] in the island most distant from Honolulu posed a clear and present danger to the administration of justice in Judge Wiig's court, is inconceivable. There is neither finding nor argument to that effect made here.

As for the circumstance that appellant was counsel in that pending case, this is wholly irrelevant. *If* it were not for Cammer v. United States, 350 U.S. 399, and *if* appellant were being proceeded against in the United States District Court for Hawaii for contempt of that court, (she was not, and Cammer says she could not be), then her connection with that case might have meaning. But that it has no significance here even the Hawaii court seems to have recognized, for this circumstance is not even mentioned in its conclusion.[25]

Finally, what of the suggestion that while a newspaper or a layman may criticize prosecuting officers, and attack courts and

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[23]The language above quoted from Craig v. Harney, supra, is that "conceivably" in a matter pending, a campaign could "cross the forbidden line."

[24]Hammond's World Atlas, 1955 ed., gives Honokaa's population as 1021.

[25]This is the conclusion quoted in footnote 1, supra.

judicial officers, yet the constitutional free speech protections do not extend to such actions by a lawyer? I do not here refer to utterances of a lawyer which (a) threaten the judge's person or reputation,[26] or (b) charge that the court or judge has knowingly misused its powers in a particular case,[27] or (c), assert that the judge is corrupt or politically motivated.[28] There is no such case here, as I have shown. Actually Judge Wiig was not even criticized, much less attacked.

But in respect to such criticism, as was here made, no suggestion has ever been made that a lawyer's criticism is any less protected than when made by a layman or a newspaper. Indeed, everything that has been said authoritatively about the First Amendment is to the effect that the rights there granted are universal and all-covering. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow." Bridges v. California, supra, p. 263.

I think it would be a sad day when a court held that a lawyer has any less right to criticize the Smith Act, or the use of conspiracy indictments, or of professional witnesses, or the results and decisions in the Yates and Dennis cases, than any other person. For the lawyer is, above all other persons, the one best equipped by training to discuss such controversial questions. To say they may be discussed by laymen, but not by lawyers is untenable.

Rather than saying that the right of a lawyer to criticize or attack current judicial procedures is less than that of a layman, there is reason for belief that the lawyer's speaking out on such matters serves a public purpose. Court proceedings, especially criminal proceedings, have an impact on fundamental rights. It is essential that the people be informed on such rights. Lawyers are equipped to discuss them. They know, what Judge Learned Hand has said: "Liberty lies in the hearts of men and women;

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[26]Bradley v. Fisher, 13 Wall. 335.

[27]Duke v. Committee on Grievances, (C.A.D.C.) 82 F. 2d 890.

[28]Cobb v. United States, 9 cir., 172 F. 641.

when it dies there, no constitution, no law, no court can save it."[29] Professor Thomas Reed Powell has been quoted as saying, "Nine men in Washington cannot hold a nation to ideals which it is determined to betray."[30] I see no way in which it can be held that a President of a Bar Association may discuss these things but persons holding appellant's views may not.

This case bears a striking resemblance to the threatened disbarment in 1938 of one Edward Lamb, a Cleveland lawyer, said to have been a "labor lawyer". While the case never came to trial and was not reported, the part taken in it by the then Solicitor General Robert H. Jackson can be found reflected in a later decision of the Supreme Court to which I shall hereafter allude—a decision of importance here. Lamb, during the trial of a case, and in the courtroom, said directly to the judge: "We were hijacked through this court all day yesterday, and I will tell you now I don't intend to be hijacked all day today." The judge might have punished him for contempt, but did not do so. However, proceedings were brought to disbar him. The Solicitor General came to Lamb's aid, as he concluded from the record Lamb did not deserve disbarment. Jackson was criticized for going on Lamb's committee. He wrote a letter in reply to that criticism. When the letter was made public the disbarment was dropped. The letter precisely fits the situation here. Mr. Jackson noted that the court had an adequate remedy for any contempt. "For some reason this remedy was abandoned." Then followed the declaration of a rule which the author, as an Associate Justice, later wrote into an opinion: "Mere contempt of court has never been considered cause for disbarment." Mr. Jackson proceeded: "Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with other bar leaders,

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[29]Hand, "The Spirit of Liberty."

"In this connection we must remember that the strength of the Constitution is not in the written instrument, nor in the laws enacted to carry it into effect, nor even in the judiciary which interprets and enforces the laws, but in the minds and hearts of the people." Judge John J. Parker, American Bar Association Journal, Jan. 1958.

[30]See Chaffee, Free Speech in the United States, Chap. X.

adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals.[31]. . . In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer."

* * *

"You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law.

* * *

"I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be made the excuse for depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected." The full text of the letter is in the margin.[32]

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[31]These matters were described somewhat more in detail in Mr. Justice Jackson's opinion for four of the members of the Court in In re Isserman, 345 U.S. 286, 290, 293. The four judges were the majority who set aside the disbarment order at 348 U.S. 1.

[32]"June 7, 1938
Mr. William R. Daley
Cuyahoga Building
Cleveland, Ohio
Dear Sir:

I have your letter criticizing me for authorizing the use of my name in connection with the protest against the disbarment proceedings involving Edward Lamb. I usually ignore criticism, on the theory that friends require no explanation, enemies will accept none, and others do not care. Since your criticism has been so painstaking as to lead you to read the record in the case, I shall depart from my usual rule.

The language of Lamb to the effect that he had been hijacked and did not intend to be hijacked again is not approved or defended by the

In this letter Mr. Jackson suggested that the reason for that proceeding was that Lamb was a labor lawyer. Appellant here

committee of which I am a member, as you would see if you had read its statement. Neither do we assume to sit in judgment on the conduct or rulings of the court.

The court had an adequate remedy for any contempt. If I were presiding and was not conscious of having provoked such language, I should hold a counsellor in contempt and fine him appropriately and commit him until it was paid. This would be proportioned to the offense, would be an adequate humiliation to any lawyer, and would vindicate the dignity of the court. For some reason this remedy was abandoned. Timely and fairly used, it would have been no affair of lawyers generally, even if the penalty might seem to them excessive or the offense excusable.

Mere contempt of court has never been considered cause for disbarment. Hot words, even to a judge, do not usually deprive one of his livelihood. If you are familiar with the history of the Bar, many instances of contempt without disbarment will occur to you. Elihu Root and Willard Bartlett were, with other bar leaders, adjudged to be in contempt of court when they were defending William M. Tweed. No one suggested that either of them should be disbarred. Instead, one became a great leader of the American Bar, and the other became Chief Judge of the New York Court of Appeals. Recently in the District of Columbia a lawyer was found guilty of contempt and punished, and immediately thereafter was elected to high office in the American Bar Association. Not long ago a leader of the New York Bar was adjudged in a Federal Court to have been 'studiously contemptuous' even characterizing parts of the court's charge as a 'stump speech.' He paid his fine and no one suggested that disbarment be inflicted or even considered. A government lawyer was fined for contempt in the same case—nor was he deprived of office or of standing at the Bar. Many other instances could be cited.

In Lamb's case, however, the Court allowed the time for appropriate remedies for Lamb's contempt to pass, and the Bar Association then proposed disbarment, which would drive Lamb from his profession for life and deprive him of a livelihood. I know of no adequate explanation of this fierce and vindicative proposal except that Lamb is a labor lawyer. That offensive and habitual activity on behalf of labor is the cause of his prosecution is affirmed by examination of the petition for disbarment with its allusion to 'class hatreds,' and is further confirmed by the reference in your letter to 'corporation baiters.'

This raises an issue wider than the relative proprieties of the lawyer and the judge. I take it that you will grant that in the economic struggle labor is entitled to have its lawyers. If from habitual representation of labor causes they become known as 'corporation baiters,' I

was a labor lawyer.[33] She was also a lawyer for alleged Communists. In alluding to that I do so only for the purpose of suggesting that this circumstance is the reason I feel we should examine the facts with the greatest of caution lest our detestation of Communism obscure our vision. I make no suggestion here similar to the strictures of Mr. Jackson. I feel sure that this proceeding was instituted in good faith.

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know of no reason why they, any more than their counterparts who become exclusively 'corporation lawyers' should be disbarred. I do not think of any specialty in law practice, but I grant the right, and will defend the right, of a lawyer to devote himself to labor representation as his specialty, if he desires.

You suggest that the defense of Lamb proceeds from a desire to break down the judicial system. This, it seems to me, shows a lack of understanding of the requirements of a judicial system. We can have no worthy judicial system unless we protect the right of advocates to champion the cause of any person who becomes involved in the machinery of the law. I know of no group today that needs competent lawyers to defend it in the courts more than labor. May I remind you that of eleven Labor Relations Board cases on which the Supreme Court has passed, seven of them—more than two-thirds of them—the Supreme Court held to have been unlawfully and improperly decided against labor by the lower court judges. The burden of a labor lawyer in our courts is not easy.

My position on the committee is that I shall defend the right of any member of our profession to appear habitually, if he desires, in labor causes, and the right of a man at the bar to become a 'labor lawyer' as well as to be a 'corporation lawyer.' I expect him to pay such penalty as would be exacted from the lawyers on the other side if they were guilty of similar conduct. I do not expect a breach of conduct which would be passed, generally, with a small fine or an apology to be made the excuse for depriving a labor lawyer of his right to practice his profession, or to deprive labor of a representative who has zeal in its cause, even if the zeal is sometimes misdirected.

I, with the others, will leave no stone unturned to see that this effort does not succeed and to focus public opinion on the effort if it is persisted in.

Sincerely yours,
Robert H. Jackson."

"America's Advocate: Robert H. Jackson", by Eugene C. Gerhart, p. 152.

[33]See Ackerman v. International Longshoremen's & W. Union, 9 cir., 187 F. 2d 860.

But there is one advantage we today have over the prosecutors as they stood in December, 1952. For since that time all of us have learned much about Communism, and that it is a more deadly peril that we had thought. Now we are learning that the way to fight Communism is not by aping its denial of liberty, or its suppression of freedom of speech. When this proceeding was started a generally held notion of our national peril was epitomized in the cry, "Who promoted Major Peress?" When we thought of Communist we thought only of the neighbor next door whose ideas we did not like . . . But today we know that the real threat comes from a different direction and it is an open one: "We'll bury you!" Free men cannot be buried. But if we insist on chipping away our heritage of liberty and freedom then indeed we shall be in danger of losing the decisive battle,—that for the minds and hearts of men. Mr. Justice Jackson put it well when he said: "I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else."[34]

The Affidavit Concerning the Juror

The second charge in the complaint relates to appellant's alleged misconduct in interviewing the juror in the Fujimoto case after the verdict had been returned. After alluding to the fact that "it has not been uncommon, if not in fact common practice," for attorneys to interrogate jurors after rendition of verdict by them, and adding that any one who "*hereafter* . . . interrogates one who has been . . . a juror of a trial jury", as to any occurrence in the jury room or as to what may have been persuasive in reaching the verdict "acts at his peril", the court then concluded: "However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller." (Emphasis mine) I think it is plain

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[34]Shaughnessy v. Mezei, 345 U.S. 206, 227, (dissenting opinion).

if it wasn't true. He said that at some time he heard it said that if the defendants weren't convicted it would affect Hawaii's getting statehood. He said that the jurors on the side of the Government said that anybody who was a member of the Communist Party must know what its purposes are and are guilty.

"'He said that the jury wanted Kawano's testimony. He said the jurors on the defense side asked for Kawano's testimony to show that none of the defendants ever talked about overthrowing or destroying the government.

"'He said that one juror said a number of times during the deliberations that he had to go to the Mainland and that they should get it over with.

"'He said that if he voted for the defendants he was afraid the other jurors would tell about it and it would hurt his family. He said one of the jurors played cards in the jury room. He said that there was anger and shouting in the jury room between the persons who were for [450] the prosecution and those who were for the defense. Particularly the jurors for the prosecution got angry with the ones who were holding out.

"'He said they didn't take any secret ballot but anybody on the defendants' side had to speak up and then the others would try to get them to back down. He said that he heard jurors talk about Attorney Gladstein and said he was too smart and that he had defended the Communists in New York and had served a jail sentence. He said that he heard some of the jurors talk about the war against Communism. He said that they didn't consider the character evidence for the defendants.

"'He said the second thing the jury decided was that all defendants were members of the Communist Party.

that the court below simply took no action on this charge. Judge Chambers said: "To us, this is a statement that the penalty for the two charges is imposed concurrently—the same penalty for both charges." The court might have said that, but it did not.[35]

Even the majority concede that if the case were to be reversed on the first charge this second one would have to be referred back to the territorial court. It is my view that there is no justification for any such remand or for any order other than a flat reversal and dismissal of the whole proceeding.

It would be hard to find a more frivolous charge than this second one relating to the affidavit. I shall touch upon that shortly, but first I make inquiry as to whether we may review action of the Hawaii court upon that second charge if we assume that it took any.

A reading of the majority opinion indicates that the court has no doubt of its power to review such a decision for it proceeds to review it at length. I thoroughly agree that we have such power. Our jurisdiction arises under §1293 of Title 28.[36] Most of what I have said heretofore demonstrates that we have here a case of violation of the Constitution. The Court of Appeals for the First Circuit operates under the same jurisdictional statute. It has often held that in a case which presents a federal question, the whole proceeding is reviewable, and the court has jurisdiction to decide "whatever questions of local law may be presented regardless of amounts in controversy." Mercado Riera v. Mercado

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[35]Convincing proof that the Hawaii court did not think it was passing on the second charge is the fact that Chief Justice Towse signed the opinion. It was his view that his court could not entertain this charge, and that it should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

[36]"1293. Final decisions of Puerto Rico and Hawaii Supreme Courts —The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the Supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs."

The next thing they decided was that if they were Communists they must have intended to overthrow the government. He said that he himself did not believe Kawano and he heard others say they did not believe Muller. He said that after they asked for the instructions they used the one which told them to decide first whether there was a conspiracy, and right off they decided there was, and then talked about whether defendants were members of the Communist Party. He said there was a lot of talk about Bailey.

"'After this conversation took place, when Jack Hall and I started to leave, Mr. Fuller begged Mr. Hall not to leave and raised his hands above his head and appeared to be praying although the words were not audible. Before leaving, Mr. Hall tried to quiet Mr. Fuller and helped Mrs. Fuller put her husband in bed. [451]

"'Mr. Hall and I again went to see Mr. Fuller on Sunday, June 28, shortly after 1:00 o'clock in the afternoon. We were accompanied on this occasion by Joseph Kealalio. When we arrived, Mr. Fuller was sitting in a chair in the living room. He kept looking at Mr. Hall but did not speak.

"'After conversing with Mrs. Fuller for a very short period of time, we came to the conclusion that it would be better to wait until Mr. Fuller was in better physical and mental condition.

"'When Mr. Hall started to leave, Mr. Fuller again pleaded with him not to leave.

"'Further affiant saith not.

"'/s/ HARRIET BOUSLOG.

Riera, 1 cir., 152 F. 2d 86, 92.[37] Moreover, this is a case "where the value in controversy exceeds $5000 exclusive of interest and costs." It is shown here, and the fact is not controverted, that one year of appellant's practice has a value to her of more than $5000.[38] That such facts give us jurisdiction was recognized by this court in Whittemore v. Farrington, 234 F. 2d 221. That was a case in which jurisdiction depended upon the value in controversy. The court found such jurisdiction was lacking because the most it could discover by way of value was some $1600 which one Edmund Leavy would have lost in trustee's fees. But in its footnote 7, (p. 225) it recognized the general principle applicable here: "For the general principle that the measure of the value in controversy, for purposes of testing the jurisdictional amount, in suits wherein the plaintiff seeks specific relief rather than damages, is the value of such relief to the plaintiff, see Hunt v. New York Cotton Exchange, 205 U.S. 322, . . . In First State Bank v. Chicago, R. I. & P. R. Co., 8 cir., 1933, 63 F. 2d 585, . . . the rule is applied to an action brought to abate other actions."

The same principle is often applied in passing upon the jurisdiction of a United States district court where it is dependent upon amount in controversy. Thus in an injunction suit designed to protect a business or property the necessary amount in controversy may exist notwithstanding there may be no prayer for damages. See Hunt v. New York Cotton Exchange, 205 U.S. 322, 336; Bitterman v. Louisville N. R. Co., 207 U.S. 205, 225; Gibbs v. Buck, 307 U.S. 66. I see no possible excuse for saying that the right to practice law is a privilege which is priceless and beyond value and hence there cannot be a value in controversy. If disbarment is sustained, Mrs. Sawyer will lose more than $5000 and that is all there is to it.

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[37] "We are not prepared to say that all of these federal questions are colorable and frivolous. Thus regardless of how we decide them, we have jurisdiction under §128 of the Judicial Code, supra, not only to consider them but also to go further and decide whatever questions of local law may be presented regardless of amount in controversy."

[38] This proof was made by affidavit in accordance with Title 28, §2108. See De La Torre v. National City Bank of New York, 110 F. 2d 381, 384, approving this procedure.

Appellant cannot be disciplined in the Hawaii court for conduct in connection with a case in the federal court which federal law holds proper. This case bears no resemblance to In Re Isserman, 9 N.J. 269, 87 Atl. 2d 903. In that case, the conduct condemned, besides the rape conviction, was iniquitous no matter where carried on. Here the Supreme Court of Hawaii expressly recognized that interviewing jurors after verdict was common practice for lawyers in Hawaii. Yet if Judge Chambers is right, it proceeded to impose a suspension of practice on appellant for following that common practice, all because of its rule stated to be a guide for counsel "thereafter". But such an order reaches even greater heights of absurdity. It suspends for conduct in connection with a federal case which the federal courts have recognized to be proper.

An able discussion of the propriety of procuring post-verdict affidavits from members of a jury is that of Judge Learned Hand in Jorgensen v. York Ice Machinery Corp., 2 cir., 160 F. 2d 432, 435. That was a case in which the court considered at great length affidavits of jurors presented in support of motions for new trial disclosing the deliberations in the jury room while the case was under submission. The court held that whether a new trial should have been granted was a matter within the judge's discretion, but the court assumed the propriety of procuring the testimony of the jurors as to what happened. Citing Mr. Wigmore's work on Evidence, the court criticized, as does Mr. Wigmore, the oft-quoted statement that jurors may not "impeach their verdict." The court cited McDonald v. Pless, 238 U.S. 264, 268, which discussed the propriety of the use of affidavits of jurors as to what happened in the jury room. That case stated: "Both of those decisions recognize that it would not be safe to lay down any inflexible rule because there might be instances in which such testimony of the juror could not be excluded without 'violating the plainest principles of justice.'" Clyde Mattox v. United States, 146 U.S. 140, furnishes an instance in which the court held that affidavits of jurors were properly used to show overt acts in the jury room which are accessible to the knowledge of all the jurors.[39]

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[39]The whole subject of the use of such affidavits by jurors is treated at length by Wigmore, 3d Ed., Vol. 8, §§2352, 2354.

Since jurors' affidavits may thus be used on motions for new trial, a lawyer may of course interview the juror for the purpose of procuring the facts and the affidavits; otherwise they would be unobtainable. Of course it was the appellant here who made the affidavit. That affidavit is subject to the infirmity that it is hearsay. Even so, it would not be inappropriate to furnish such information to the judge; he might wish to pursue the inquiry himself. Cf. Remmer v. United States, 350 U.S. 377. But the appellant is not charged with the offense of presenting hearsay. (If that were an offense the ranks of the legal profession would indeed be decimated.) The impropriety charged here is Mrs. Sawyer's interview with the juror. Let it be conceded that if the juror Fuller had sworn to everything that was in appellant's affidavit, his testimony would not have furnished any basis for a new trial. But this is the first time I have ever heard it suggested that an attorney may be suspended from practice for attempting to present evidence of doubtful relevance or competency. The court below is without power to discipline appellant for acts done in a case in a federal court which, under the decisions of the federal courts, she had a right to do.

Suppose appellant had done much worse things. Suppose she had even been guilty of contempt of the court. The rule established by In Re Isserman, 345 U.S. 286, 290, and 348 U.S. 1, is that a lawyer is not subject to suspension or disbarment in any court merely because he has been convicted of contempt.[40]

Under Title 28, §2106, we may direct the entry of such appropriate judgment as may be just under the circumstances. The only appropriate or just judgment here is one dismissing the proceedings.

* * *

As is elsewhere apparent, the foregoing part of this opinion was written and circulated prior to the writing of Judge Barnes' concurring opinion. What I have said above sufficiently discloses why my view of the facts differs from that which he expresses.

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[40] "We do not recall any previous instance, though not venturing to assert that there is none, where a lawyer has been disbarred by any court of the United States or of a state merely because he had been convicted of a contempt." (345 U.S. 292) This is the opinion of the four Justices who were the majority at 348 U.S. 1. See footnote 34, supra.

Assuming that the dissenter normally writes last, I have only one word to add:

I think Judge Barnes in, as it were, dissenting from my dissent, has misunderstood my version of the facts. It will be noted that I said: "In my view there can be no other conclusion here than that the appellant's speech was an attack upon the Government's method of procedure in Smith Act cases including the one then on trial at Honolulu; and an attack upon the Smith Act generally." I did not say or suggest that appellant was not discussing the *pending* case. This is further plain from the fact that I treated at length, with reference to the Bridges, Pennekamp and Harney cases, the consequences of the appellant's attack relating to a *pending* case. Essentially my point has been that the speech must be read in context, and the context was all Smith Act cases, including this one. I cannot agree that an attack on a pending case is by reason of that fact an attack on the judge who presides in it.

STEPHENS, Chief Judge, dissenting.

I join Judges Pope and Hamley in dissenting to the majority decision of the Court.

(Endorsed:) Opinion, Concurring Opinion and Dissenting Opinion. Filed June 9, 1958.

Paul P. O'Brien, Clerk.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 6-11-58—200

APPENDIX B.

Opinion of the Supreme Court of the Territory of Hawaii.

In the Supreme Court of the Territory of Hawaii, October Term 1955.

No. 3044.

In the Matter of: Harriet Bouslog Sawyer, Also Known as Harriet Bouslog, an Attorney at Law.

Argued March 1, 1956. Decided April 6, 1956.

Towse, C. J.; Rice, J.; and Circuit Judge McKinley in Place of Stainback, J.; disqualified.

Per Curiam. This is a matter instituted in this court by the Bar Association of Hawaii, an unincorporated association, by a complaint filed herein on July 8, 1954, under former and then in effect Rule 19 of the rules of this court. The complaint alleged as follows:

"I.

"That Harriet Bouslog Sawyer, hereinafter referred to as the Licensee, is and at all times hereinafter mentioned continuously has been an attorney at law duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and before the United States District Court for the District of Hawaii, and that the said Licensee is now and during all of said times herein mentioned has been a practitioner before said courts.

"II.

"That the said Licensee, while appearing as counsel of record for certain defendants in that certain case in [443] the United States District Court for the District of Hawaii entitled 'United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et al., Defendants,' being

Criminal Number 10495 in said court, during the course of the trial of said case, to wit, on or about December 14, 1952, did say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the government could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created.

"III.

"That said Licensee did during the course of said trial and shortly after rendition of a verdict therein visit a juror who was known by her to be indisposed, and thereafter submitted her affidavit concerning an interview with said juror to the presiding judge under circumstances indicating a failure to comply with standards of professional conduct required of practitioners of law licensed to practice before this Court." (See Bill of Particulars, infra.)

Pursuant to the prayer thereof and to the provisions of said Rule 19, the complaint, contained in this court's secret file number 45, was on July 8, 1954, referred to the committee on legal ethics and unauthorized practice of the supreme court of the Territory of Hawaii.

The said committee to which the matter was referred, [444] subsequently designated and hereinafter referred to as the legal ethics committee, or as the committee, on September 21, 1954, entered an order, requiring the Bar Association of Hawaii, as complainant in the matter, to either file a bill of particulars or amend paragraph "III" of its complaint of July 8, 1954, making more specific its

charge therein set forth; and also requiring that on or before October 15, 1954, Harriet Bouslog Sawyer, also known as Harriet Bouslog, "file such special pleas as she wishes to present with respect to the jurisdiction of the Committee and the sufficiency of the complaint and on or before October 15, 1954, file such information as she wishes to present to clarify her request that the hearing of this matter should be postponed until after disposition of the Fujimoto case, supporting such statements by copies of the briefs, excerpts therefrom, or such other information as she deems advisable to show that the matter involved in the complaint filed in the above matter is the same as involved in the appeal of the Fujimoto case."

The Bar Association of Hawaii, by A. William Barlow, Esq., attorney, submitted a bill of particulars, dated the 29th day of September, 1954, which excepting the title of court and cause, was and is as follows:

"BILL OF PARTICULARS

"Pursuant to an Order entered on September 21, 1954, by the Legal Ethics Committee, the following Bill of Particulars is hereby furnished:

"1. Copy of the Affidavit of Harriet Bouslog, subscribed and sworn to before a notary public on the first day of July, 1953, signed by the Licensee Harriet Bouslog [445] and filed in the United States District Court for the District of Hawaii on July 1, 1953, in the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto et al., Defendants, Criminal No. 10,495.

"'Affidavit of Harriet Bouslog

"'Territory of Hawaii,

"'City and County of Honolulu—ss.

"'I, Harriet Bouslog, being first duly sworn, on oath depose and say:

"'On Friday evening, June 26, 1953, shortly before 6:00 o'clock I received a telephone call at my home from Ellen Fuller Cabreros, sister of David P. Fuller who sat as a juror in the case of United States v. Fujimoto et al. Mrs. Cabreros asked me if I could come and see her brother; that he was seriously ill.

"'I went to the Fuller home at 1734 Colburn Street and was taken by Mrs. Cabreros and Mrs. Fuller into the front bedroom where Mr. Fuller was lying in bed. He appeared to be gravely ill.

"'I talked with his wife, Helen Fuller, in the living room of their home in the presence of Ellen Fuller Cabreros and her friend, Grace Oshiro, and two of the Fuller children. All members of the family present were upset and in tears at the state of Mr. Fuller. Mrs. Fuller stated that she had called a doctor to examine her husband and informed me that her husband had been ill since the return of the verdict, and particularly since early in the morning of Saturday, June 20, 1953, the morning after the verdict was returned.

"'Mrs. Fuller said that on Saturday morning, the day [446] immediately following the verdict of guilty in the Smith Act case, at about five o'clock in the morning, she found her husband on his knees praying, begging God for mercy, saying he had sinned, that he had lied in the eyes of God; that Jack Hall was innocent and the case was a frameup; that Jack Hall is a good man; that those people

are doing good for humanity and here someone is trying to block them. She said that in the time since, her husband had told her that the jury only looked at the Government's case and scarcely talked at all about the defendants' side and their case; that he asked her and the children to forgive him because he had done something wrong and it was too late; he said that one of the jurors said the defendants were innocent, and when the other jurors said, "Guilty, guilty," that juror threw a book across the room and said they just as well forget about it. Mrs. Fuller said that her husband had wanted to go see the judge and confess that he had lied, and once or twice tried to leave the house but was too upset mentally and physically and unable to leave the house by himself; that he fell and struck his head. She said that she and other members of her family urged him not to do anything, not to go to see the Judge and to forget about it, that he would only get himself in trouble and would get them in trouble, and that he might go to jail.

"'Mrs. Fuller said that when he tried to leave and was unable to, she and other members of the family put him back in bed and tried to keep him quiet; that he kept shouting and crying and praying saying that the case was a frameup, that he had done wrong, and told the children and her to stay away from him because he was not clean. She said that [447] his condition seemed to get worse and worse as the days went by until on Friday, June 26, 1953, all day he was in bed and did not move or get up at all, and his voice became scarcely a whisper because he was hoarse from the shouting on previous days.

"'After the conversation with Mrs. Fuller, I went in the bedroom where Mr. Fuller was and asked him if he wished a drink of water. He nodded that he did.

During this time, Mrs. Fuller, his sister and her friend were present in the room. Mr. Fuller struggled to talk and make himself heard but because of his weakened physical condition and the loss of his voice, it was difficult to understand what he said. He stated understandably, however, that he wanted help and wanted to get a clear conscience and get the wrong he had done straightened out.

"'Shortly after my arrival, a Doctor Chang arrived. I was not present in the bedroom during the conversation between Dr. Chang and Mrs. Fuller, although I could hear the conversation between Dr. Chang and Mrs. Fuller from the living room. After Dr. Chang had talked to Mrs. Fuller, Mrs. Fuller told me that the doctor said after examining her husband that there was nothing physically wrong with him, that he would have to rest in bed, and that it might be necessary to take him to a hospital unless he would get up to go to the bathroom.

"'After the doctor had left, in the presence of Mrs. Fuller, Mrs. Cabreros and her friend, Grace Oshiro, and Mrs. Fuller's eldest daughter, I gave Mr. Fuller water and he was propped up in bed. Again he tried to talk but seemed to find difficulty in doing so. He said he wanted [448] to talk about the matter and would talk to Jack Hall or anyone at any time to get a clear conscience.

"'Shortly after this I left, believing Mr. Fuller needed rest. I made arrangements with Mrs. Fuller and Mr. Fuller to come to see him the next day with Jack Hall.

"'On Saturday morning I was informed by Mrs. Cabreros that her brother was feeling considerably better and wanted to and would be able to see us.

"'When Mr. Hall and I arrived at the Fuller home about 1:00 o'clock Saturday afternoon, June 27, Mr. Hall

put out his hand to Mr. Fuller, Mr. Fuller looked at Mr. Hall for a long time and finally took his hand. Mr. Hall told Mr. Fuller he did not hold anything against him; that he just wanted Mr. Fuller to get well.

"'Mr. Fuller said to Mr. Hall that from the talk of guilty by other jurors in the jury room, he believed he had to vote guilty to protect his brothers because he was afraid they would be fired if he did not. Mrs. Fuller said that both of Mr. Fuller's brothers, Leonare and Harry, worked for Isle-Ways. Mr. Fuller said that it wasn't right that they only looked at Government exhibits and not at the defendant's exhibits or case. He said it was a frameup and said he blamed himself. He said that they looked at Government exhibits and any time someone suggested looking at defense exhibits some juror would say, "Later, later," and they never got around to it. He said that he knew and believed the defendants were innocent all the time but was afraid of what would happen if he voted not guilty.

"'He said that the jury in their deliberations decided that the Communist Party was a conspiracy within the [449] "first hour after they began their deliberations. He said that the instruction of the Judge which they used to decide this was the one which told them first to decide whether there was a conspiracy, and they decided the Communist Party was a conspiracy. He said he knew from what he heard the defendants were convicted before the case started on ideas the jurors had before the case started. He said he heard two jurors tell the Judge that they were opposed to Communism during the examination. He said that no secret ballots were taken, so everyone knew how each juror voted. He said some of the jurors said the Government wouldn't bring the charge

"'Subscribed and sworn to before me this 1st day of July, 1953.

"'[Seal] /s/ J. D. MARQUES,

"'Notary Public, First Judicial Circuit, Territory of Hawaii.

"'My commission expires: July 15/53.'"

"The Complainant Bar Association neither affirms nor denies the truth or falsity of the allegations and facts contained in the affidavit filed by the Licensee Harriet Bouslog. The Complainant informs the committee that the above-recited affidavit, its contents, and the manner in which it was obtained furnishes the basis for the charge against the Licensee Harriet Bouslog and that the Complainant will introduce evidence in elaboration [452] of and in corroboration of the charge indicating a failure by the Licensee Hariet Bouslog to comply with standards of professional conduct required of practitioners before this Court and which unprofessional and unethical conduct is condemned in Opinion 109 issued March 10, 1934, by the Committee on Professional Ethics and Grievances by the American Bar Association and by Judge Prettyman in the case of Rakes vs. United States, 169 F. 2d at pages 745 and 746 and other related cases.

"Dated: Honolulu, T. H., this 29th day of September, 1954."

By letter dated October 14, 1954, addressed to the chairman of the legal ethics committee, J. Garner Anthony, then attorney for Harriet Bouslog, advised the committee as follows:

"This is to advise you that Mrs. Bouslog will present no special plea to the jurisdiction of the Committee nor

does she propose to file any material or argument in support of her prior request for a continuance until the disposition of Fujimoto, et al., v. United States; No. 13,195.

"If the Committee believes it appropriate to hear this matter in advance of a determination of the Fujimoto case, we are ready to proceed. Our only request is that the matter be heard before the full Committee."

Thereafter proceedings were had before the said committee and the latter subsequently, to wit, on July 1, 1955, filed herein, under the aforesaid secret file number 45, its report, wherein the committee expressed an unanimous opinion that the Bar Association of Hawaii had sustained the allegations in paragraphs "I" and "III" of its complaint; that in her comments made at Honokaa (as alleged in paragraph "II" of [453] the complaint) the respondent licensee ("Mrs. Bouslog") imputed to the judge unfairness in the conduct of the trial (of the case of United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, et als., Defendants, Criminal 10,495, United States District Court for the District of Hawaii); impugned the integrity of the local Federal courts and made other comments and thus was guilty of violation of canons 1 and 22 of the canons of professional ethics of the American Bar Association and should be disciplined for the same; also, that there were * * * "differences of opinion within the Committee as to whether her interviews with juror Fuller were proper, as to whether they were in violation of Canon 23 of the Canons of Ethics and as to whether she should be disciplined, although the majority thinks she should be disciplined with respect to the charges in paragraph III" of the complaint.

Attached to and submitted with the report of the committee was a separate written statement by one member

of the committee, wherein he expressed concurrence in the findings of the committee that the conduct of the respondent licensee was, with respect to the Honokaa speech and with respect to the matters concerning the juror, improper; and nonconcurrence in the conclusion of the other members of the committee with respect to the recommendations the committee should make to the court; and expressing his view that the then rule 19 of the rules of this court required that the committee, when recommending disciplinary action should go further and recommend "the nature of the discipline it feels is proper." He recommended that, "for the improper conduct of Mrs. Bouslog with reference to the Honokaa speech, she be suspended from the practice of law for such period of time as the Court may deem just and proper"; and that [454] for her conduct regarding the juror which the committee had found improper "she be reprimanded."

Included with the report of the said committee and therewith returned secret file number 45 were: the complaint of the Bar Association of Hawaii against the licensee; the pleadings and memoranda which had been filed since the complaint, to wit, petitioner's (Bar Association of Hawaii's) exhibits 1, 2 and 6 and licensee's exhibits B, C, D, E, F and G introduced at the hearings before the committee, with the notation by the chairman of the committee that petitioner's exhibits 3, 4 and 5, copies of newspapers presented at the hearing before the committee on December 2, 1954, were subsequently withdrawn.

After consideration of the said committee's report, on July 8, 1955, this court issued to said licensee, Harriet Bouslog Sawyer, also known as Harriet Bouslog, an order to show cause, if existing, why the findings, conclusions and recommendations of the committee should not be

adopted. Then, the matter was removed from the secret file as number 45 thereof and became number 3044 of the regular files of this court.

By order of court dated the 8th day of July, 1955, and filed herein on July 12, 1955, attorney A. William Barlow, member of the Bar of this court, was designated to, in conjunction with the attorney general of the Territory of Hawaii, present the cause on behalf of the compainant, the Bar Association of Hawaii.

On July 27, 1955, by order of the Chief Justice of this court the licensee was granted an extension of time to September 19, 1955, within which to answer the order to show [455] cause theretofore issued. Subsequently, upon motions or requests on her behalf, further extensions of time were granted to the licensee to and including November 7, 1955, within which to file her return to the order to show cause and hearing on the latter was set for November 8, 1955.

On October 19, 1955, J. Garner Anthony, Esq., who had been of counsel for licensee at hearings before the committee and herein, filed a withdrawal as counsel, such bearing date of October 18, 1955.

On October 19, 1955, the licensee, therein referred to as "respondent"—"by way of return to the order to show cause issued on July 8, 1955"—moved to dismiss the order to show cause, upon several grounds therein set forth. Such motion was contested, a memorandum in opposition thereto having been filed on behalf of the complainant on October 26, 1955. To the latter a memorandum in opposition was filed on October 28, 1955. Argument on the motion and pertinent memoranda was heard, in open court on November 3, 1955, before the Chief Justice and Jus-

tices Stainback and Rice. At the conclusion of the argument the motion was by the court denied, the Chief Justice dissenting in part and concurring in part.

The licensee (as respondent) was then granted to and including November 7, 1955, within which to file her return to the order to show cause and hearing thereon was set for November 8, 1955.

On November 4, 1955, conference was had between the justices and counsel upon a request that additional time be granted to the licensee to obtain mainland counsel to represent her. At the conclusion of such conference the return to the order to show cause was set forward to December 2, 1955, and [456] argument on the case set for January 9, 1956, at 9:00 a.m.

A motion for reconsideration was filed on November 7, 1955, by Myer C. Symonds, Esq., on behalf of the licensee. Such motion was argued on November 14, 1955, before this court, consisting of the Chief Justice and Justices Stainback and Rice.

On November 29, 1955, there was entered and filed an order denying the motion to dismiss the order to show cause, Chief Justice Edward A. Towse dissenting in part upon the ground that the charges premised upon the Fuller affidavit should be dismissed "as an interference with the administration of justice in the United States District Court for the District of Hawaii and a possible usurpation of the power thereof."

On December 2, 1955, there was filed on behalf of the licensee, by Myer C. Symonds, Esq., her attorney, a return to the order to show cause.

On December 7, 1955, there was filed, on behalf of the licensee, a motion for continuance, together with a notice

thereof, the motion being based upon an affidavit of John T. McTernan, Esq., and an affidavit of Harriet Bouslog, the licensee.

On December 12, 1955, argument was had on the said motion for continuance filed on December 7, 1955. The motion was denied and the court reiterated that the hearing on the order to show cause would stand as previously set for hearing on January 9, 1956, at 9:00 a. m.

On January 9, 1956, a pretrial conference was had in the chambers of the Chief Justice, he being present and also Justices Stainback and Rice, as the court, and Attorney General Edward N. Sylva, Deputy Attorney General Morio Omori, and A. William Barlow, Esq., on behalf of the complainant, and attorneys John T. McTernan and Myer C. Symonds, on behalf of the respondent [457] licensee. Subsequent to said first pretrial conference, to wit, on January 11, 1956, there were filed on behalf of the respondent licensee a suggestion of disqualification of Mr. Justice Stainback and also a suggestion of disqualification of Mr. Justice Rice, the two associate justices of this court. A memorandum in opposition to said suggestions of disqualification of the justices was filed on behalf of the Bar Association of Hawaii by the attorneys above named as appearing on its behalf at the pretrial conference on January 9, 1956.

Argument on the two suggestions of disqualification and the memorandum in opposition thereto was set for January 12, 1956, but was continued to and heard on January 16, 1956, and at the conclusion thereof the subject matter was taken under advisement.

Subsequently—see opinion of the court by Stainback, J., concurring opinion of Rice, J., and dissenting opinion

of Towse, C. J., filed together on January 19, 1956—the court rejected the affidavits upon which the suggestions for disqualification were based and held: "that neither Mr. Justice Stainback nor Mr. Justice Rice is disqualified," for reasons set forth and summarized as follows:

"1. The provisions of section 9573 of the Revised Laws of Hawaii 1945 relating to disqualification of judges because of bias or prejudice are not applicable to justices of the supreme court; however, a justice in addition to being disqualified by reason of relationship, pecuniary interest or previous judgment as set forth in section 84 of the Organic Act, may excuse himself from participating in a case where he feels that fairness and justice require such withdrawal." [458]

"2. The suggestions of disqualification of the justices for bias or prejudice were not timely made; in fact, not until after affiant had received an adverse ruling on the sufficiency of the complaint did she make her affidavit of bias and prejudice against the two justices ruling against her. Would it be unreasonable or unfair to infer that these affidavits were made because she had tried the "pool of litigation" with her toe and found it too cool for a plunge, as did the little boy testing the temperature of the water? (State vs. Armijo, *supra.*)

"3. The affidavit attempting to disqualify Mr. Justice Stainback is at least technically defective and that referring to Mr. Justice Rice is not only technically defective but does not in the remotest degree set forth any facts which would show such personal bias or prejudice against the affiant."

However, because of a statement which he had previously made to a committee of the United States Senate

(which he quoted in the aforesaid opinion of the court by him) Mr. Justice Stainback said: "I, therefore, shall take no part in the hearings of this matter [the proceedings herein against the respondent licensee] upon its merits but respectfully suggest that a substitute be selected to serve in my stead."

Mr. Justice Stainback having withdrawn, pursuant to the provisions of law, the remaining justices, the Chief Justice and Mr. Justice Rice, requested and authorized the Honorable Frank A. McKinley, fourth judge of the circuit court of the first circuit, Territory of Hawaii, to sit with them temporarily in place of Associate Justice Ingram M. Stainback, to hear and [459] determine this said cause, commencing on January 20, 1956.

Therefore, from and inclusive of January 20, 1956, and throughout the remainder of proceedings herein, this court was comprised of Mr. Chief Justice Edward A. Towse, Mr. Justice Philip L. Rice, and Circuit Judge Frank A. McKinley, the latter substituting for Mr. Justice Stainback.

Before the court as comprised as last aforesaid, pretrial hearings, at which were present A. William Barlow, Esq., attorney for the Bar Association of Hawaii; Honorable Edward N. Sylva, Attorney General, Territory of Hawaii; and John T. McTernan, Esq., and Myer C. Symonds, Esq., attorneys for the respondent licensee, were held on January 20 and 23, 1956. Thereat it was determined that from the filing with this court of the report of its said legal ethics committee and the thereupon issuance of this court's order to the respondent licensee to show cause, if existing, the proceedings instituted by the Bar Association of Hawaii against the said respondent licensee had come

before this court for trial de novo. Also that, in lieu of the taking anew of testimony and evidence in this proceeding before this court, the cause would, the respondent licensee consenting through her attorneys, be submitted upon the record which had been developed by and before the aforesaid committee and this court would file a pretrial order conformable to such determination.

On February 6, 1956, the pretrial order was entered and filed.

It was thereby ordered:

"1. The record upon which this matter is to be submitted to the Court and determined by it is the following: [460]

"a. The Complaint of the Bar Association of Hawaii, dated July 8, 1954.

"b. The Bill of Particulars submitted by the Bar Association of Hawaii dated September 29, 1954.

"c. The Report of the Legal Ethics Committee to this Court dated June 9, 1955.

"d. The Order to Show Cause made and entered by this Court on July 8, 1955.

"e. The Return to the Order to Show Cause of Harriet Bouslog, respondent, dated December 2, 1955.

"f. The transcript of all proceedings before said Legal Ethics Committee, including the testimony adduced and the exhibits offered and received.

"g. And all motions, briefs and memoranda of law heretofore filed with this Court herein.

"2. The Court will consider the matter, as submitted on the record, disregarding those portions thereof not bearing on the charges set forth in the said Complaint.

"3. The parties hereto will file and exchange briefs on or before February 23, 1956.

"4. The Court will hear oral argument on Thursday, March 1, 1956, beginning at 9:00 o'clock a. m."

Pursuant to the pretrial order, *supra*, the entire record specified therein, with transcript of oral testimony presented before and heard and the exhibits admitted in evidence by the said legal ethics committee has and have been submitted to this court for scrutiny and evaluation; the parties filed and exchanged briefs on February 23, 1956, and oral argument was heard in open court on March 1, 1956. At the conclusion of the oral argument the matter was taken under advisement by this court. [461]

This court has scrutinized the record, the transcript of oral testimony and the exhibits aforesaid, read the briefs filed, examined the cases cited therein, and considered them with the oral arguments presented on March 1, 1956, and has since made its own evaluation thereof, inclusive and particularly of the evidence, and has drawn its own conclusions therefrom, unprejudiced by the report of the legal ethics committee, which made no comment on the relative credibility accorded by such committee to the witnesses, severally, or the weight given by the committee to the exhibits.

The court has noted in the record and particularly in the transcript of her testimony that the respondent licensee has exhibited an evasiveness and a lack of frankness as to her actions and sayings which were under investigation and inquiry. When confronted with testimony of witnesses who were of her audience at her speech in Honokaa, Hawaii, on or about December 14, 1952, and which testimony was to the effect that she had made the

statements attributed to her in paragraph "II" of the complaint of the bar association, she did not categorically deny making such statements, but equivocated by saying in effect that she had no recollection of making them and also that they were not indicative of language she would have used. However, she admitted authorship of the pamphlet, entitled "Fear," a copy of which was admitted in the proceedings before the legal ethics committee and is a part of the record, as exhibit 6 and comparison of the language used therein with the language attributed to her in her Honokaa speech reveals great similarity.

It is the finding and conclusion of this court that the allegations contained in the complaint of the Bar Association of Hawaii, more particularly paragraphs "I." "II," and "III" [462] thereof and the aforesaid bill of particulars pertinent to the last mentioned, have been sustained by convincing proof, by credible evidence of more than a mere preponderance; that the said respondent licensee, a member of the Bar of this court and an attorney at law, duly licensed and admitted to practice before all of the courts of the Territory of Hawaii and, also, before the United States District Court for the District of Hawaii, did, as charged in said paragraph II, being then an attorney of record for a defendant in a then pending case in the United States District Court for the District of Hawaii entitled "United States of America, Plaintiff, vs. Charles Kasuyuki Fujimoto, *et al.*, Defendants," being criminal number 10,495 in said court, during the course of trial of said case, to wit, on or about December 14, 1952, say during a speech to a public gathering in Honokaa, Hawaii, that horrible and shocking things were going on at said trial; that a fair trial was impossible; that all of the rules of evidence were being scrapped so the govern-

ment could make its case; that the rules of evidence and procedure were made up as the case proceeded; and that unless the trial was stopped in its tracks certain new crimes would be created. Also, that, as charged in said paragraph III and the bill of particulars pertinent thereto, said licensee did—at the request of the juror's sister—shortly after rendition of a verdict in said case visit a juror and interrogated him, David P. Fuller, known to licensee as being indisposed, with respect to what may have transpired in the jury room, when the jury was therein for the purpose of considering the evidence and arriving at a verdict in the said case, which interviewing of the said juror was set forth in a subsequent affidavit by the said licensee, a copy [463] of which was and is incorporated in the aforesaid bill of particulars with respect to said paragraph III of the complaint of the bar association.

Upon its finding and conclusion as stated, *supra,* this court deems that in saying what she did in her speech to a public gathering at Honokaa, Hawaii, on December 14, 1952, as aforesaid, when there was then pending in the United States District Court for the District of Hawaii a case under the Smith Act, to wit, the case entitled "United States of America, Plaintiff, vs. Charles Kasuyuki Fujimoto, *et als.,* Defendants," being criminal number 10,495 in said court, she engaged and participated in a wilful oral attack upon the administration of justice in and by the said United States District Court for the District of Hawaii and by direct statement and implication impugned the integrity of the judge presiding therein and in the said pending case, within the territorial boundaries of the Territory of Hawaii, and thus tended to also create disrespect for the courts of justice and judicial officers generally, *contra* to the obligations and duties assumed,

as incident to the license, by her and by every person to whom a license has or shall have been issued by this court to practice in the courts of the Territory of Hawaii. She has thus committed what this court considers gross misconduct.

Wherefore, in the exercise of its inherent and statutory disciplinary power, this court orders that, for one year commencing from and next succeeding the entry of judgment herein, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice—either directly or indirectly and in any manner—in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, [464] solicitor and proctor thereof; and that she also pay all costs and expenses incurred in, or incident to, the proceedings herein.

It is further ordered: that, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof in an appropriately marked file of the court; also, that upon entry of judgment herein, an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of Hawaii.

It appears from the transcript which we have examined pursuant to the pretrial order herein, that her first visit to said David Fuller was made by the respondent licensee upon request by his sister. It also appears that it has not been uncomon, if not in fact common practice, heretofore and within the Territory of Hawaii, for attorneys as well as others to interrogate jurors, after rendition of verdict

by them, as to what may have been decisive in reaching a verdict.

However, even if she relied upon the request of his sister when she first visited David Fuller, and upon a belief that it was common practice, locally, to interrogate trial jurors after verdict, such reliance thereon is not acceptable as excuse for her repeated visits to and studied interrogation of Fuller under the circumstances and as set forth in her affidavit, incorporated in the bill of particulars. In this connection, we quote from and adopt as a declaration of the view of this court, the following extract from the opinion of the court in Rakes ys. United States, 169 F. (2d) 739 (4th Cir. [465] 1948):

"We are impelled to add a further word upon this matter. The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a search-

ing or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it."

Let it be known that one acts at his peril: (1) who within the jurisdiction of the courts of the Territory of Hawaii hereafter, either directly or indirectly, without good cause shown to and express authorization of a court of record, or a judge thereof, interrogates one who has been, as well as one then being, a juror of a trial jury in any case, as to any occurrence in the room wherein and during the time when the trial [466] jury shall be, or have been, secluded therein for the purpose of conference or deliberation and an endeavor to reach a verdict; or (2) who shall after verdict interrogate one, who has been a juror of any said jury, as to what may have been persuasive in reaching the verdict, or upon what the jury based it.

However, in the instant matter, this court will let its hereinbefore expressed disciplinary order—suspending the said respondent licensee from the practice of law in the territorial courts for one year and requiring her to pay costs—suffice, although also deeming gross misconduct her said repeated interviews with and interrogations of David Fuller.

It has been indicated to this court that as the proceedings herein have been with respect to the conduct—which we have found to be gross misconduct—of the respondent licensee, the said Harriet Bouslog Sawyer, also known as Harriet Bouslog, in connection with or relation to a case in a Federal court, to wit, the case of the "United States of America, Plaintiff, vs. Charles Kazuyuki Fujimoto, *et als*, Defendants," criminal number 10,495, in the United States District Court for the District of Hawaii, this Supreme Court of the Territory of Hawaii should not

have taken cognizance thereof and assumed and exercised jurisdiction in the instant matter.

We cannot accept that view of the situation. The respondent licensee is a member of the Bar of this and all other courts of the Territory of Hawaii, by virtue of a license issued to her by the Supreme Court of the Territory of Hawaii which license was by the express language thereof to be in effect "during good behavior." Therefore, the behavior of the respondent licensee as an attorney is ever a concern of the licensing court. See *In re* Isserman, 9 N. J. 269, 87 A. (2d) 903. [467]

Appended hereto and by reference incorporated herein and made a part hereof is a memorandum of other cases in re disciplinary proceedings against attorneys, which cases—as well as others—have had our consideration in connection with the instant matter.

Let judgment be entered pursuant hereto and in conformity herewith.

/s/ EDWARD A. TOWSE,
/s/ PHILIP L. RICE,
/s/ FRANK A. MCKINLEY.

A. William Barlow (Also on the Briefs) for the Bar Association of Hawaii, Complainant.

Edward N. Sylva, Attorney General, and Morio Omori, Deputy Attorney General (Also on the Briefs) for the Territory.

John T. McTernan and Myer C. Symonds (Also on the Briefs) for Respondent-Licensee Harriet Bouslog Sawyer, also known as Harriet Bouslog. [468]

Concurring Opinion of Circuit Judge McKinley.

I concur with the majority in the finding of gross misconduct on the part of respondent, but would change the disciplinary action to that of disbarment.

/s/ FRANK A. MCKINLEY. [469]

MEMORANDUM OF ACTION BY COURTS IN RE DISCIPLINARY PROCEEDINGS AGAINST ATTORNEYS.

1. *In re* Isserman, 1952 N. J.
   (Disbarment.)
2. *In re* Ades, 1934 U. S. D. C., Md.
   (Reprimand.)
3. Bar Ass'n v. Philbrook, 1934 Cal.
   (Disbarment.)
4. *In re* Bevans, 1929 N. Y.
   (Suspension—1 year.)
5. *In re* Breen, 1908 Nev.
   (Disbarment.)
6. Bar Ass'n v. Metzen, 1919 Ill.
   (Disbarment.)
7. *In re* Chopak, 1946 U. S. D. C., N. Y.
   (Suspension—3 years.)
8. Cobb v. U. S., 9th Cir., 1909.
   (Suspension—18 months.)
9. Duke v. Comm. on Griev., 1936 D. C.
   (Disbarment.)
10. *In re* Dunn, 1909 Neb.
    (Indefinite suspension.)
11. *In re* Egan, 1909 S. D.
    (Readmission denied.)

12. *In re* Graves, 1923 Cal.
(Suspension; period not mentioned in case.)
13. *In re* Hanna, 1924, N. M.
(Suspended by District Court; reprimanded.)
14. *In re* Hilton, 1916 Utah.
(Disbarment.)
15. *In re* Humphrey, 1917 Cal.
(Suspension—2 years.)
16. Johnson v. State, 1907 Ala.
(Disbarment.)
17. Ky. State Bar v. Lewis, 1955.
(Suspension—Six months.)
18. *In re* Knight, 1942 N. Y.
(Disbarment.)
19. Lewis Co. Bar Ass'n v. Willis 1917.
(Suspension—1 year.)
20. *In re* Mains, 1899 Mich.
(Disbarment.)
21. *In re* Meldrum, 1952 Iowa.
(Suspension—1 year.)
22. *In re* Mitgang, 1944 Ill.
(Censured.)
23. *In re* Palarine, 1945 Minn.
(Dismissed.)
24. Colo. Bar Ass'n v. Ginsburg, 1930.
(Suspension—1 year.)
25. *In re* Richeson, 1946 Ariz.
(Disbarment.)
26. *In re* Robinson, 1907 Wash.
(Suspension—Six months.)
27. *In re* Rogers, 1923 N. M.
(Suspension—Six months.)

28. *In re* Snow, 1904 Utah.
(Suspension—Two months.)
29. Snyder's Case, 1930 Pa.
(Suspension—1 year.)
30. State v. Brekenridge, 1927 Okla.
(Suspension—One month.)
31. *In re* Kirby, 1915 S. D.
(Dismissed.)
32. State v. Root, 1896 N. D.
(Dismissed because of irregularities.)
33. State Bar Comm. v. Sullivan.
(Disbarment.)
34. State Bd. of Law v. Hart, 1908.
(Suspension—Six months.)
35. State Bd. of Law v. Spriggs, 1945.
(Suspension—Six months.)
36. Neb. Bar Ass'n v. Price, 1944.
(Dismissed; lack of particulars.)
37. *Ex parte* Steineman, 1880 Pa.
(Reversed lower court.)
38. *In re* Troy, 1920 R. I.
(Suspension—2 years.)
39. U. S. v. Green, 1898 C. C. D. Colo.
(Disbarment.)
40. U. S. v. Markewich, 1919 S. D.
(Censured.)
41. Wilhelm's Case, 1921 Pa.
(Disbarment.)
42. *In re* Wright, 1951 Nev.
(Suspension—Six months.)

43. *In re* Barenaba, 5 Haw. 279 (1885)
(Suspension—Three months.)
44. *In re* Paakiki, 8 Haw. 518 (1892)
(Suspension—2 years.)
45. *In re* Thompson, 15 Haw. 155 (1903)
(Suspension—1 year.)
46. *In re* Bevins, 26 Haw. 570 (1922)
(Suspension—Three months.)
47. *In re* French, 28 Haw. 47 (1924)
(Disbarment.)
48. *In re* Lyman, 30 Haw. 405 (1928)
(Disbarment.)

[Endorsed]: Filed April 6, 1956 [470]

In the Supreme Court for the Territory of Hawaii,
October Term, 1955

No. 3044

In the Matter of
HARRIET BOUSLOG SAWYER, Also Known as HARRIET BOUSLOG, an Attorney at Law.

JUDGMENT

This cause having been considered by this Court upon the entire record specified by the Pre-Trial Order entered on February 6, 1956, and the parties having filed their respective briefs on February 23, 1956, and having presented oral argument in open court on March 1, 1956, and upon the findings of fact and conclusions of law set forth in the Per Curiam Opinion filed in this Court on April 6, 1956, It Is Ordered, Adjudged and Decreed:

1. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, be suspended and prohibited from practice, either directly or indirectly and in any manner whatsoever, in all and every one of the courts of the Territory of Hawaii, as an attorney at law, counsellor, solicitor and proctor thereof, for a period of one year from the date hereof.

2. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, forthwith surrender to a clerk of this court the license heretofore issued by the court to her, dated December 23, 1941, and that said clerk thereupon place and retain such license, together with a certified copy hereof, in an appropriately marked file of the court, and that an appropriate entry thereof be made in and upon the roll of attorneys licensed by this court to practice in all courts of the Territory of [472] Hawaii.

3. That Harriet Bouslog Sawyer, also known as Harriet Bouslog, pay all costs and expenses incurred in, or incident to, the proceedings herein.

Dated at Honolulu, T. H., this 7th day of April, 1956.

[Seal]

/s/ EDWARD A. TOWSE,
Chief Justice,

/s/ PHILIP L. RICE,
Associate Justice,

/s/ FRANK A. McKINLEY,
Substitute Justice.

[Endorsed]: Filed April 7, 1956. [473]

APPENDIX C.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii, as Amended, October 31, 1953.

19. RULE GOVERNING PROCEEDINGS TO STRIKE ATTORNEY'S NAME FROM ROLL AND THE UNLAWFUL OR UNAUTHORIZED PRACTICE OF LAW.

1. Complaints against members of the bar for improper or unprofessional conduct shall be in writing and filed in triplicate by the attorney general, any of his deputies, or any person aggrieved by the conduct of any attorney licensed to practice in any territorial court, with the clerk of the supreme court of the Territory of Hawaii, who shall keep the same in a secret file available only to the justices of the supreme court, the person charged, and the committee to which the court may have referred the matter for investigation as hereinafter provided.

Such complaint need not be formal but shall be in writing and set forth with reasonable certainty the time, place and circumstances of the alleged misconduct, and if filed by anyone other than the attorney general or one of his deputies, it shall be verified under oath, and the court may require the same to be made more specific.

If the court deems that the complaint sets forth a *prima facie* case of misconduct warranting investigation, it may refer the same to a standing committee, to be known as Committee on Legal Ethics, consisting of three members of the bar, appointed by the court for investigation. The members of said committee shall hold office at the pleasure of the court. Such committee shall furnish the accused person with a certified copy of the complaint which shall be prepared by the clerk of the supreme court. Any at-

torney complained of may file an affidavit of bias and prejudice with the court concerning any member of the committee at any time prior to the commencement of the hearing by the committee. If the court shall find the same well-founded the court shall appoint another person to such committee to replace the member thus disqualified.

Such committee is hereby empowered and charged to investigate and take proof concerning such complaint. The hearings before the committee shall be private, unless the attorney charged shall request that they be public. The person charged shall be entitled to be present at every hearing of the committee and to be represented by counsel, to cross-examine witnesses, and to submit such evidence as he desires. Upon request of the committee, this court may assign a reporter of the circuit court to take and transcribe shorthand notes of the testimony, and a clerk of the circuit court to administer oaths, in the same manner as before a circuit judge.

Upon application by such committee, the clerk of this court shall issue writs of subpoena *ad testificandum,* writs of subpoena *duces tecum* or *dedimus potestatem* to take depositions. Any person failing to obey any such subpoena shall be in contempt of this court and subject to punishment accordingly.

At the end of the hearing, the committee shall make report to this court of its findings of fact and conclusions of law and file therewith the record of such hearing, all of which shall be kept by the clerk in a secret file available

only to the attorney charged and to the justices of the supreme court. The attorney charged shall, upon request, be entitled to receive from the clerk of the supreme court a certified copy of the committee's report and the record of the hearings had before the committee. If the committee shall recommend disbarment or other discipline, the matter shall then be docketed, made a matter of public record, and entitled in the name of the attorney charged, and thereupon an order shall issue from this court to the attorney charged to show cause, if any he has, why the findings and conclusions of the committee should not be adopted, and such judgment as the court may deem proper entered. When the rule shall be answered the court shall fix the time for hearing, and may designate the attorney general or one of his deputies or any member of the bar of this court to present the case on behalf of the complainant. The matter shall be tried *de novo* by the court, and such judgment shall be entered as the court shall deem proper.

APPENDIX D.

Pertinent Portions of Rule 19, Rules of the Supreme Court of the Territory of Hawaii as Amended, April 21, 1954.

RULE 19. IMPROPER OR UNPROFESSIONAL CONDUCT AND UNAUTHORIZED OR UNLAWFUL PRACTICE OF LAW.

1. Complaints of improper or unprofessional conduct by any attorney licensed to practice in any court of the Territory of Hawaii (hereinafter referred to as the licensee) or of any unauthorized or unlawful practice of law by any individual, partnership, corporation or other entity (hereinafter referred to as the person charged) may be filed in this Court by the Attorney General, the Bar Association of Hawaii (hereinafter referred to as the Bar Association) or any person aggrieved.

The complainant shall, if other than the Attorney General or the Bar Association, verify the complaint under oath. An original and five (5) copies of the complaint shall be filed with the Clerk of this Court (hereinafter referred to as the Clerk), who shall keep the same in a secret file available only to the Court and to such other persons as herein provided.

The Court shall refer the complaint to its Committee on Legal Ethics and Unauthorized Practice (hereinafter referred to as the Committee), which shall consist of seven (7) members of the Bar of this Court, of whom five (5) constitute a quorum. Members shall be appointed by and hold office at the pleasure of the Court. The Court shall designate the Chairman. The Committee shall hold its hearings in the courtroom of the Court. All expenses incurred by the Committee in connection with

its hearings shall be borne by the Court. The Committee shall be empowered, subject to the approval of the Court, to formulate rules for the government of its procedure.

The Committee shall cause the licensee or the person charged to be served, in the manner provided by law, with a copy of the complaint, together with a notice of the time and place of hearing. Due return of the service of the complaint and notice shall be filed with Committee. If the complaint shall have been filed by other than the Bar Association, a copy of the complaint and notice shall be furnished the President of the Bar Association and the Bar Association shall thereafter be permitted to appear at any hearing before the Committee or proceeding before the Court as *amicus curiae*.

The licensee or person charged shall have the right within ten (10) days prior to the date set for the commencement of the hearing to file an affidavit of bias and prejudice concerning any member or members of the Committee. All challenges raised by such affidavit shall be passed upon by the Committee, whose determination with respect thereto shall be final. In the event challenges determined to be well founded shall reduce the number of available members of the Committee below that necessary for a quorum for the hearing of the matter complained of, the Court shall make additional appointments to the Committee.

The Committee is empowered and charged to conduct a hearing for the investigation of those matters raised by the complaint. The hearing shall be closed unless the licensee or person charged makes a written request prior to the commencement of the hearing that it be a public hearing. The licensee or person charged shall be entitled

to be present at the Committee hearing, to be represented by counsel thereat, to cross-examine witnesses, and submit evidence. Hearings shall be conducted in such manner as to permit the admission of relevant evidence. Upon request of the Chairman, the Court may assign a reporter to record and transcribe testimony and a clerk to administer oaths. Upon application of the Chairman, the Clerk shall cause to be issued, writs of subpoena *ad testificandum, duces tecum* or *dedimus potestatem.* Failure to obey any such subpoenas shall be deemed contempt of the Court.

On completion of the hearing the Committee shall file with the Court its findings of fact, conclusions of law and recommendations as to action to be taken by the Court in the matter, together with the entire record of its proceedings, including all papers, transcripts, minutes and exhibits, all of which shall be kept by the Clerk in the secret file. The licensee or person charged, and, upon request, the Bar Association and the Attorney General, shall be entitled to receive from the Clerk a certified copy of the findings of fact, conclusions of law and recommendations of the Committee.

If the Committee shall recommend disciplinary action be taken against the licensee or a judgment entered against the person charged, it shall submit an Order to Show Cause issuable from this Court, addressed to the licensee or person charged, directing within twenty (20) days of issuance that cause be shown, if such exists, why the findings, conclusions and recommendations of the Committee should not be adopted. Upon issuance of the Order the same shall be served upon the licensee or person charged, in the manner provided by law, and the case shall be docketed and made a matter of public record.

The Court may designate the Attorney General or one or more members of the Bar of this Court to present the case on behalf of the complainant. Upon an answer being filed to the Order to Show Cause, the Court shall fix a time for hearing and the matter shall be heard *de novo*. On failure of the licensee or person charged to answer as required in the Order, default shall be entered and proof, should the Court so order, may be made *ex parte*. Such judgment may be entered as the Court shall deem proper.

Nothing herein contained shall be construed to require this Court to follow the recommendations of the Committee and irrespective of such recommendations this Court may, in its discretion, proceed or refrain from proceeding in any cause falling within the purview of the Rule.

2. The presently existing jurisdiction and power of this Court and the other Courts of the Territory of Hawaii to grant appropriate relief in causes involving improper or unprofessional conduct by attorneys or unauthorized practice of law by other persons, shall not be deemed to be limited, restricted or abrogated by anything contained in Section 1 of this Rule.

3. This Rule shall become effective forthwith and shall govern all proceedings brought on or after this date, and all pending proceedings except to the extent that in the opinion of the Supreme Court the application of the Rule to a pending proceeding would not be feasible or would work injustice in which event the former procedure shall apply. April 21, 1954.

APPENDIX E.

Rule 15 (d), Rules of the Supreme Court of the Territory of Hawaii (Effective October 3, 1955).

RULE 15. ADMISSION TO THE BAR.

. . . (d) Reinstatement of Disbarred or Suspended Attorneys. No attorney who has been disbarred or suspended shall be eligible for reinstatement except upon a clear showing that he has complied in good faith with the order of disbarment or suspension, and that he is entirely worthy of the court's trust and confidence. An attorney who has been disbarred, or suspended for a period of six months or more, upon certification by the court of his eligibility, shall be required to pass an examination as though applying for admission to the bar.

APPENDIX F.

Pertinent Portions of Rule 1, Rules of Civil Procedure for the United States District Court for the District of Hawaii (as Amended and Effective March 21, 1955).

RULE 1. ATTORNEYS.

(a) Roll of Attorneys.

The bar of this court consists of those heretofore and those hereafter admitted to practice before this court, who have taken the oath prescribed by the rules in force when they were admitted or that prescribed by this rule, and have signed the roll of attorneys of this district.

(b) Eligibility.

Any person who is a member in good standing of the bar of (1) the highest court of this Territory or of (2) the highest court of a state is eligible for admission to the bar of this court.

* * * * * * * * * * * *

(d) Disbarment and Discipline.

Any member of the bar of this court may for good cause shown and after an opportunity has been given him to be heard, be disbarred, suspended from practice for a definite time, reprimanded, or subjected to such other discipline as the court may deem proper.

Whenever it is made to appear to the court that any member of its bar has been disbarred or suspended from practice or convicted of a felony in any other court he shall be suspended forthwith from practice before this court and, unless upon notice mailed to him at his last known place of residence he shows good cause to the contrary within 20 days, there shall be entered an order of

disbarment, or of suspension for such time as the court shall fix.

Any person who before his admission to the bar of this court or during his disbarment or suspension, exercises in this district in any action or proceeding pending in this court any of the privileges of a member of the bar or who pretends to be entitled so to do, is guilty of contempt of court and subjects himself to appropriate punishment therefor.

(e) Disciplinary Proceedings.

(1) The court will appoint by an order entered in its minutes a "Standing Committee on Discipline," consisting of five members of the bar, and will designate one of the members to serve as chairman. The members shall continue in office for a period of two years or until further order of the court.

(2) It shall be the duty of the committee to investigate any charge or information, referred by one of the judges or otherwise coming to the attention of the committee, that any member of the bar may have been guilty of unprofessional conduct or of any conduct unbecoming a member of the bar of this court; and in cases where a majority of the members shall deem advisable, the committee shall institute and prosecute an appropriate disciplinary proceeding.

(3) Every proceeding hereunder shall be commenced by filing with the clerk an appropriate petition on behalf of the committee addressed to the judges of the court. Upon the filing of the petition, the proceeding shall be assigned to one of the judges in the same manner as any other civil action or proceeding pursuant to directions given to the clerk by the court.

(4) The judge to whom the proceeding is assigned shall forthwith issue an order to show cause, addressed to the respondent member of the bar, requiring him to appear and show cause within not less than ten nor more than twenty days from the date of the order, why he should not be disbarred, suspended, or otherwise disciplined as prayed for in the petition. The order shall further require that a copy thereof, together with a copy of the petition, be served on the respondent in a manner permitted by Rule 5 (b) of the Federal Rules of Civil Procedure, not less than ten days in advance of the date therein specified for showing cause.

(5) The judge to whom any proceeding hereunder is assigned may invite the other judge of the court to sit with him and participate in the proceeding.

(6) In all proceedings hereunder, written findings of fact and an order based thereon shall be filed.

(7) Except as otherwise provided in this rule, all proceedings hereunder shall be governed by the Federal Rules of Civil Procedure.

(8) Disciplinary proceedings under this rule shall not affect or be affected by any proceeding for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

APPENDIX G.

Summary of Testimony Concerning Honokaa Speech.

Matsuoka (newspaper reporter, "Hilo Tribune Herald"):

". . . She said she wanted to tell the people about some of the shocking, horrible things that went on, and that the Smith Act trial could not be a fair one, and that they just had to go around and make rules to fit the situation. That was, I think, the general trend." [R. 151.]

On cross-examination he gave this testimony:

"Q. It [petitioner's speech] was a general criticism as to the character of the criminal proceedings brought under the Smith Act, isn't that a fair statement? A. Yes, a portion of that speech, I think." [R. 161.]

Ferreira (worker at Honokaa Sugar Company):

"She started off telling us about the Smith Act trial; that there was no fair trial in the Smith Act case; that the government—I mean, they made up their rules as they went along in Smith Act trial, and she compared the Majors-Palakiko case with the Smith Act trial, and she also stated that in the Smith Act trial they tried you on a conspiracy, and 'conspiracy' was explained to us, not the exact wording, but was something that they tried you for, for your thoughts; in other words, something that some people think, or you might think of, or this person might think of doing some day, but never actually did, but that is how she explained it on this conspiracy. * * * Q. Did she mention any particular locality when she was talking about the Smith Act trial? A. If I remember right it was in Honolulu, but I am not too sure about that; I think it was down here." [R. 163-164.]

John D. Morse (Industrial Relations Director, Honokaa Sugar Company):

"Yes, I recall a few things. I did hear her say that there is no such thing as a fair trial in a Smith Act case, and she said that. Well, she talked quite a bit about Jack Hall, Mr. Hall was there; about the trial that was going on at that time. Q. Did she in anywise talk about the rules of evidence in the Smith Act trial? A. Yes. I don't remember word for word, naturally, but she did say that in a Smith Act case that the government permitted evidence that was primarily in their favor—in favor of the government. [R. 165.] * * * Q. Mr. Morse, do you remember Mrs. Bouslog making any statement as to whether there was such a thing or not as a fair trial in the Smith Act case? A. I remember her saying there was not such a thing as a fair trial in a Smith Act case. [R. 167.] Q. And do you remember whether she referred to the conduct and manner in which it was being handled? A. Well, it tied in, I figured it, tied in with any Smith Act case, whether in Honolulu, New York, or whatever it was; that is the impression I got from what she said." [R. 167.]

Olival (Women's Editor, "Hilo Tribune Herald"):

". . . She said that the trial was against Jack Hall, and six others were just brought in, and that its purpose was to get at the ILWU; she said that Jack Hall was being tried on something that he read many years ago, and she said that in the Smith Act trial there were no rules, and that they were making up the rules as they went along, and she said that the F.B.I. could be called Federal cops, and that when the government—they were stressing this case, and when the government—that witnesses were afraid to

testify, and they testified usually what the government wanted them to testify. * * * Q. Mrs. Olival, did Mrs. Bouslog use a phrase indicating that there were rather shocking and horrible things that were going on at the trial? A. Yes, she used those." [R. 171-172.]

Ramos (clerk, Honokaa Sugar Company):

"I said she said there was no fair trial in the Smith Act case. * * * It has been so long that most of it I have forgotten." [R. 179.]

Andrade (worker, Honokaa Sugar Company):

". . . she said she would like to tell the audience of the horrible and shocking things that went on at the Smith Act trial in Honolulu, and she also gave several illustrations, but, I am sorry, I cannot remember them, and she also said that the Federal government had created the evidence as they went along, and she referred to the F.B.I. men as Federal cops, at which time she received hearty applause from the audience. There were approximately 250 people present. Most of them were union members, . . ." [R. 180-181.]

Crabb (office manager of Paauhau Sugar Plantation Company):

"Q. Will you tell the Committee what Mrs. Bouslog said? A. Well, that the defendant in the Smith Act trial cannot get a fair trial. Q. What Smith Act trial was she talking about? A. The one in Honolulu. Q. Did she say anything else? A. And in regard to the communism books, she said those who read those books might be prosecuted." [R. 183.]

Phyllis P. Morse (wife of John D. Morse):

". . . she said that there was no such thing as a fair trial under the present Smith Act case in Honolulu, and that the newspapers were not giving a full account, a true account, and that from time to time they and we would be coming to the various islands to acquaint a group with the true facts. . . . that the government could submit any evidence they liked at any time, and that they could also use books that might not have any bearing on the case. . . . she gave various examples of things . . . that were going on, in what she called the horrifying, shocking trial." [R. 184-185.]

Hall (Regional Director for International Longshoremen's & Warehousemen's Union, defendant in Fujimoto case):

testified that he, not petitioner, made the "horrible and shocking things" remark. [R. 395.] He said that petitioner did not say the judge was making up the rules of evidence as he went along. [R. 397.] Petitioner said there were different rules of evidence in a Smith Act trial "as compared to the normal criminal trial." She criticized "the rules, not the rulings." [R. 397.]

Petitioner:

Concerning the "horrible and shocking things" remark, petitioner testified in the proceeding below, "Two days afterward I stated to Judge Wiig that I had no recollection of ever making any statement of any kind of that character or having said those words". [R. 435.] She also testified that she had said "There is no such thing as a fair trial in the Smith Act case." [R. 443.] She said she "was talking about the Smith Act and the Smith Act in

general. . . . that there was no such thing as a fair trial in any Smith Act case." [R. 444-445.] She supplied her authorities for the view that under conditions existing at the time of the Honokaa speech, a Smith Act trial for Communists could not be fair. [R. 445-448.] Her purpose was to provide her audience with sufficient information to persuade them to the conclusion that the Smith Act "was a bad law which should be repealed." [R. 448.]

She denied saying "All rules of evidence have to be scrapped or the government can't make a case," and stated that her references to rules of evidence dealt with the explanation of the difference between those rules in a conspiracy case and in an ordinary criminal case, pointing out that the government took advantage of "a latitude under the rules of evidence in conspiracy." [R. 443-444.]

Concerning the alleged remark that unless the Smith Act trial were stopped a new crime would be created, petitioner said that her remarks in substance were these:

"I said that the Smith Act—continued prosecutions under the Smith Act can lead to a new crime of reading and thought control. . . . And I said that I felt that the Smith Act would be repealed as soon as people understood what the Smith Act was." [R. 459.]

APPENDIX H.

Reference in Current Literature to Responsibilities of Lawyers to Provide Leadership in Public Discussion.

"The Traditional function of lawyers is that of servant to the whole people, guarding justice and expanding the areas of individual freedom. The judgment of history on the lawyers of our generation will be based on how adequately we have fulfilled this noble calling." William T. Gossett, General Counsel to Ford Motor Co., *Address to Michigan Judges Ass'n*, Release of Ford News Bureau, Sept. 5, 1952. "No one suggests that the American people should follow implicitly or blindly the leadership of their lawyers; but in the discussion of changes in the American form of government and in the purposes of American institutions and laws, the lawyers should do their part in the informed discussion of the great issues before the people." Judge William L. Ransom, former president of the American Bar Association, quoted by Hon. Nathaniel Goldstein, Attorney-General of the State of New York, 16 Albany L. Rev. 9 (1952). "The lawyer must not only understand the ways of democracy; he must live the ways of democracy; he must teach others and lead a nation in the ways of democracy." Hon. Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, 23 Neb. L. Rev. 75 (1944). "Our constitutional rights of free speech and of freedom of assembly make this opportunity for advocacy available to all. Advocacy is peculiarly available to the lawyer because of his special skills." Mr. Justice William O. Douglas, *The Lawyer and the Public Service*, 26 A. B. A. J. 633, 636 (1940). "There is no reason in the world people should not criticize the [Supreme] Court. I believe

in criticizing the Court, Congress, even the Governor . . . I do not think there is any group in America outside the lawyers who can be expected to preserve the individual liberties about which people speak." Mr. Justice Hugo L. Black, *The Lawyer and Individual Freedom,* 21 Tenn. L. Rev. 461, 463, 469 (1950). See also, Myron C. Taylor, Letter to the Board of Trustees of Cornell University, 14 Cornell L. Q. 197, 198 (1929), quoted in Cheatham, *Cases and Materials on the Legal Profession* (1938), p. 398; Cooley, *Constitutional Limitations* (8th ed., 1927), vol. 1, p. 703, n. 3; Hon. Stanley H. Fuld, Associate Judge New York Court of Appeals, *The Lawyer—More Than Advocate,* 15 Albany L. Rev. 1 (1951); Justice William O. Douglas, *"Law in* Eruption,"*A Concept of Lawyer's Duty in a Time of Change,* 34 A. B. A. J. 674 (1948).

APPENDIX I.

Further Citation of Authorities Dealing With Conduct Which in the Usual Course of Judicial Decision Has Been Held to Constitute Failure to Maintain the Respect Owing the Courts.

(See footnotes 21, 22 and 23, pp. 26 and 27 of Petition.)

Footnote 21:

Bradley v. Fisher, 13 Wall. 335, 20 L. Ed. 646, the attorney accosted the judge in a "rude and insulting manner" and threatened him with personal chastisement; *Elliott v. Green,* 7 Colo. 237, 3 P. 65, the attorney halted the judge on the street, addressed him in "abusive, insulting and threatening language" concerning his action in a pending matter and threatened to expose him in the newspapers; *In re Collins,* 147 Cal. 8, 81 P. 220, attorney made statement to press while matter pending before judge accusing latter of malfeasance and incompetence in office; *Chicago Bar Assn. v. Metzgen,* 291 Ill. 55, 125 N. E. 734, attorney wrote judge after latter set aside divorce decree threatening to sue judge, describing his action as "dastardly" and calling judge "irresponsible political mannikin"; *Johnson v. State,* 152 Ala. 93, 44 So. 671, attorney wrote judge that he should treat attorney as gentleman or attorney would know why and accusing judge of meeting with prosecutor to plan how and why a certain accused would be tried.

Footnote 22:

In re Hilton, 48 Utah 172, 158 P. 691, attorney in speech said that in its decision the court had been dominated by fear of the Mormon Church and had committed judicial murder; *State Board v. Hart,* 104 Minn. 88, 116

N. W. 212, the attorney wrote a letter to the Chief Justice of the Supreme Court and released a copy to the press, commenting upon a recent decision of the court, saying that it had assigned the property involved to one who had no better right to it than a burglar, that this was like robbing a widow, that the court had acted as a "fence", that the court either had emasculated intelligence or constipation of morals or faithlessness to duty, that the court was either unlearned in the law or not honest; *In re Humphrey,* 174 Cal. 290, 163 P. 60, attorney issued an election pamphlet attacking a judge for the handling of two cases in which he said, *inter alia,* that the judge had used his powers to enable a bank to keep money that another was entitled to; *State v. Breckenridge,* 126 Okla. 86, 258 P. 744, the attorney wrote a newspaper article referring to recent action of the Supreme Court of Oklahoma in which he stated erroneously that the Supreme Court had suspended the writ of habeas corpus, had an interest in the outcome of the case, and acted like a star chamber; *Wilhelm's Case,* 269 Pa. 416, 112 Atl. 561, during the pendency of a disbarment proceeding against another lawyer, the attorney made an "impassioned" speech saying that the disbarment proceeding was a conspiracy to crucify that lawyer and urging political action to prevent it; *In re Breen,* 30 Nev. 164, 93 P. 997, commenting upon a decision of the Supreme Court of the state reversing a murder conviction, the trial judge said that the opinion of the Supreme Court was an abnormal document, that it was either reprehensible or pitiable, and that it was not supported in fact or in law; *Duke v. Committee on Grievances* (C. A., D. C.), 82 F. 2d 890, the attorney filed with the appellate court a motion charging that the trial court had filed a false bill of exceptions,

that this had been done "intentionally and deliberately", and after the appellate court had refused to correct the bill of exceptions and after disciplinary proceedings had been started against him, the attorney said that the appellate court was as badly involved in falsifying the bill of exceptions as the trial judge, adding that the matter involved questions of the judicial integrity and common honesty of six federal judges; *In re Chapak* (D. C., N. Y.), 66 F. Supp. 265, during the pendency of the case the attorney wrote the judge accusing him of acting "despotically" and of deliberately taking advantage of his office to rule with "passion and vehemence". He also wrote his client saying that the judge was prejudiced against the client because the latter was a Negro; *In re Graves,* 64 Cal. App. 176, 221 P. 411, the attorney issued a public circular accusing the judge of using the "slightest flaw" to set aside a judgment against a railroad and of misusing his office so as to pry into the secrets of the juries' deliberations; *Morrison v. Snow,* 26 Utah 247, 72 P. 924, and *In re Snow, 27* Utah 265, 75 P. 741, these are related cases. In the former the attorney filed an answer to a complaint in a civil case alleging that the judge conspired with the plaintiff to bring the suit and used the weight of his judicial position to that end, and that the suit had been brought to satisfy the malicious instincts of the judge so that the fruits of it should be divided between the judge and the plaintiff. In the second case he was suspended after a hearing for having filed such a pleading; *In re Dunn,* 85 Neb. 606, 124 N. W. 120, in a petition for rehearing the attorney attacked the judge who wrote the Supreme Court's opinion, accusing him of "rank incompetence", of not knowing the plaintiff's complaint, of using reasoning that "reduces the law to a farce", of

misstating the evidence, of ignoring the evidence supporting the defendant's position, and of dispensing with the evidence so as to base his conclusions on mere conjecture; *State v. Kirby*, 36 S. D. 188, 154 N. W. 284, the attorney issued a statement to the press saying that the Supreme Court would not disbar another lawyer whose disciplinary case was then pending, because that lawyer planned to run for public office and the Supreme Court and the Governor of the state did not want that lawyer to use a decision of the Supreme Court in a third case for political purposes in a forthcoming campaign.

Footnote 23:

State Bar Commission v. Sullivan, 35 Okla. 745, 131 P. 703, the attorney caused to be printed and published a pamphlet entitled "A Criminal Combine," in which he accused a judge of participating in a criminal combination to deprive the attorney of his rights; *In re Troy*, 43 R. I. 279, 111 Atl. 723, the attorney made a speech during a Democractic campaign rally in which he asserted that judgeships on the Supreme Court of the state are "a matter of barter" and "are bought and sold" and asking "who paid money, how much was paid and who got the money at the election of the last Supreme Court judge"; *State Board v. Spriggs*, 61 Wyo. 70, 155 P. 2d 285, in an election pamphlet an attorney spoke of the "horrible and unbelievable breakdown of justice in the Supreme Court", conduct on the part of judges that "drives justice from its own temple to the habitations of bias, prejudice, failure and incompetency" and charged the judges with incompetency and corruption; *In re Bevans*, 225 App. Div. 427, 233 N. Y. S. 439, in a complaint filed in an action the attorney included allegations that judges and others had engaged in an illegal combine to commit crimes, protect

criminals and ruin those who opposed them; *Lewis County Bar Association v. Willis*, 95 Wash. 251, 163 P. 737, the attorney issued a pamphlet entitled "The Crimes and Misdemeanors of Hon. Alonzo E. Rice." This pamphlet charged Judge Rice with grand and petit larceny, malfeasance and graft, adding that his court was a school for scandal. The pamphlet charged the judge with many specific crimes and wrongful acts; *In re Egan*, 24 S. D. 301, 123 N. W. 478, the attorney through newspaper articles repeatedly charged corruption on the part of the Supreme Court and the use of political influence with its members; *In re Thatcher*, 80 Ohio 492, 89 N. E. 39, the attorney in a series of newspaper articles charged the judge with bias against plaintiffs and in favor of corporations in personal injury cases, with collusion with the employer attorneys in labor cases, with capricious judicial action in cases decided by him and with taking unlawful salary; *Cobb v. United States* (9 Cir.), 172 Fed. 641, the attorney in a letter to the press said that the court had acted in the interest of the "gang whose sinister influence has paralyzed" the judge "for the past two years"; *United States v. Green* (C. C. Colo.), 85 Fed. 857, in an appellate brief the attorney uttered a "false, scandalous and malicious libel upon two of the presiding judges." In the brief this libel attacked their integrity although the precise language is not reported; *Thatcher v. United States* (6 Cir.), 212 Fed. 801, this case rests on the same facts as *In re Thatcher, supra; In re Richason*, 64 Ariz. 85, 166 P. 2d 583, the attorney in papers filed in a case attacked the honesty, integrity and motives of individual members of the bar and made "groundless charges . . . against the judges of the Federal courts," apparently attacking their integrity although the precise language is not given

in the report. The court found that the conduct indicated "mental instability and lack of moral values"; *Bar Association v. Philbrook*, 35 Cal. App. 460, 170 P. 440, an attorney in an affidavit filed in a pending action used the following language in referring to judges of the court: "criminal, corrupt and wicked conspiracy", "calculated brutality", "corrupt deadfall"; *In re Rogers*, 28 N. M. 375, 212 P. 1034, the attorney wrote a letter to the judge saying that if ten per cent of the reports about him were true, he was a "blockhead" and the "most corrupt man . . . ever elevated to judicial position"; *In re Robinson*, 48 Wash. 153, 92 P. 929, in petition for rehearing to Supreme Court, the attorney stated that it had been rumored how the Court would vote in the case, that the estate involved therein would go one-half to the political ring under whose influence the members of the court were appointed, that the head of this ring could control federal patronage and had already decided to appoint members to federal courts in the area, and that if was the duty of the court to hear the appeal on its merits in order to wipe out these rumors; *In re Philbrook*, 105 Cal. 471, 38 P. 884, attorney filed brief with Supreme Court of state charging that one of the justices thereof, while a practicing lawyer, had participated in the preparation of a settlement agreement disposing of many issues of the case and that this agreement, if not set aside, would cause people to know that the court was corrupt. The attorney also charged that a conspiracy existed to have that agreement approved because of the power of the justice referred to and the attorney referred to him as "corrupt," "wicked" and "*particeps criminis*"; *People v. Green*, 9 Colo. 506, 13 P. 514, the attorney alleged in pleadings that the judge had accepted a bribe for rendering an unwarranted judg-

ment and that he and the bribing attorney had induced a witness before the grand jury to commit perjury; *In re Mains,* 121 Mich. 603, 80 N. W. 714, the attorney in an affidavit charged the judge with "outrageous, persistent, continued illegal and unlawful rulings", with accepting bribes, with cooperating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction" to place that attorney's client under arrest and get control of his witnesses; *United States v. Markewich* (D.C., N. Y.), 261 Fed. 537, attorney in public speech following decision by court on discontinuance of a street car line, said that the people have been discriminated against, the traction interest has supreme control of the court and everybody else, the decision was not honestly rendered, that recall would be too mild a remedy and the correct remedy should be the noose or impeachment; *Matter of Knight,* 264 App. Div. 106, 34 N. Y. S. 2d 810, attorney accused various judges who had sat on various issues arising out of complex estate litigation of being "incompetent", "mendacious", "grossly dishonest"; *Kentucky State Bar Assn. v. Lewis* (Ky.), 282 S. W. 2d 321, attorneys connected with taxpayers' litigation published advertisement and filed affidavit charging corrupt arrangement between presiding judge and political bosses to prevent another judge from sitting on the cases.

APPENDIX J.

Text of 28 U. S. C. 1293 and 2108.

28 U. S. C. §1293. Final decisions of Puerto Rico and Hawaii Supreme Courts.

The courts of appeals for the First and Ninth Circuits shall have jurisdiction of appeals from all final decisions of the supreme courts of Puerto Rico and Hawaii, respectively in all cases involving the Constitution, laws or treaties of the United States or any authority exercised thereunder, in all habeas corpus proceedings, and in all other civil cases where the value in controversy exceeds $5,000, exclusive of interest and costs.

28 U. S. C. §2108. Proof of amount in controversy.

Where the power of any court of appeals to review a case depends upon the amount or value in controversy, such amount or value, if not otherwise satisfactorily disclosed upon the record, may be shown and ascertained by the oath of a party to the case or by other competent evidence.

APPENDIX K.

Affidavit of Appellant as to Amount in Controversy.

In the United States Court of Appeals for the Ninth Circuit.

In the Matter of Harriet Bouslog Sawyer, also known as Harriet Bouslog, an Attorney at Law, Appellant. No. 15109.

Territory of Hawaii, City and County of Honolulu—ss.

Harriet Bouslog Sawyer, being first duly sworn; on oath deposes and says:

She is the appellant in the above entitled proceeding.

The value of her right to practice law in the courts of the Territory of Hawaii greatly exceeds the sum of $5,000.00, exclusive of interests and costs.

Her annual net income since she resumed the practice of law in the Territory of Hawaii in October 1946 until the time of her suspension by the judgment of the court below on April 7, 1956 has always exceeded the sum of $5,000.00, and based upon present cases and litigation her income will continue to exceed said sum.

The value of her interest in the law partnership of Bouslog & Symonds formed in February, 1948, greatly exceeds the sum of $5,000.00.

/s/ Harriet Bouslog Sawyer
HARRIET BOUSLOG SAWYER

Subscribed and sworn to before me this 8th day of May, 1956.

[SEAL]

[S] EDWARD H. NAKAMURA
Notary Public, First Judicial Circuit,
Territory of Hawaii.

My commission expires: May 19, 1958.

Received copy of the foregoing Affidavit this 9th day of May, 1956.

(s) A. William Barlow
A. WILLIAM BARLOW

(s) Edward N. Sylva
EDWARD N. SYLVA
Attorney General, Territory of Hawaii.

aminers, 353 U.S. 232, to sit in judgment on Louisiana disbarments, and we are not in any event sitting in review of the Louisiana judgment." *Id.* at 281. The narrow limits for review involved in *Konigsberg* and *Schware* do not encompass the case at bar and no important federal law that would require the granting of the writ of certiorari is involved herein.

The courts below found no contravention of the First and Fifth Amendments. (See Appendix A of Petition for Writ of Certiorari, p. 18.) This conclusion does not, in any way, conflict with the applicable decisions of this Court as to necessitate the issuance of a writ of certiorari. Also, this conclusion does not, in any way, conflict with *Bridges v. California,* 314 U.S. 252; *Pennekamp v. Florida,* 328 U.S. 331; *Craig v. Harney,* 331 U.S. 367.

This Court in *Theard* reaffirmed the oft-stated rule adopted in the courts below—that membership in the bar is a privilege burdened with conditions. Liberty and freedom of speech under the Constitution do not mean the unrestrained right to do and say what one pleases at all times and under all circumstances. They do not license scandal and defamation of courts. One of the fundamental duties of an attorney, clearly set forth in the first canon of professional ethics of the American Bar Association adopted by the Territorial Supreme Court and early recognized by this Court, is to maintain a proper respect for courts of justice and judicial officers. *Bradley v. Fisher,* 13 Wall. 335.

An attorney, of course, does not, in assuming the obligations of his profession, surrender his right as a